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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1958

INDIANA REFRIGERATOR LINES, INC.,
Petitioner,

vs.

WISCONSIN PACKING CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1979

No.

INDIANA REFRIGERATOR LINES, INC.,
Petitioner,

vs.

WISCONSIN PACKING CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that writ of certiorari issue to review the judgment *en banc* of the United States Court of Appeals for the Seventh Circuit entered in this case on March 18, 1980.

OPINIONS BELOW.

Summary Judgment was granted to defendant Indiana Refrigerator Lines by the District Court of the Eastern District of Wisconsin on September 5, 1978. *Wisconsin Packing Co., Inc.* v. *Indiana Refrigerator Lines, Inc.*, 76-C-611 (E. D. Wis. 1978). Summary judgment was affirmed by the Court of Appeals in *Wisconsin Packing Co., Inc.* v. *Indiana Refrigerator*

Lines, Inc., 604 F. 2d 1022 (7th Cir. 1979), [1979] Fed. Car. Cas. (CCH) ¶ 82,835 (7th Cir. 1979). A Petition for Rehearing *en banc* was granted, whereupon the District Court's decision granting Summary Judgment was vacated. *Wisconsin Packing Co., Inc.* v. *Indiana Refrigerator Lines, Inc.*, 618 F. 2d ..... (7th Cir. 1980), No. 78-2305 (March 18, 1980). (Full text of all decisions attached at Appendix.)

JURISDICTION.

Jurisdiction arises pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether the decision below is contrary to the teachings of the Supreme Court.

II. Whether a conflict among the circuits is presented by the Seventh Circuit's *en banc* failure to overrule *Hopper Paper Co.* v. *Baltimore & O. R. Co.*, 178 F. 2d 179 (7th Cir. 1949).

STATUTORY PROVISIONS AND REGULATIONS.

(1) The Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. § 11707(e):

> A carrier may not provide by rule, contract, or otherwise, a period of less than nine months for filing a claim against it under this section and a period of less than two years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

(2) 49 C. F. R. § 1005.2(b) which provides in pertinent part that any claim shall be made in writing, shall contain sufficient facts to identify the shipment, shall assert liability for alleged loss or damage, and shall make claim for payment of a specified or determinable amount of money. (Set forth fully in Appendix).

(3) 49 C. F. R. § 1005.2(c) providing in relevant part:

> (c) *Documents not constituting claims:* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both on freight bills, delivery receipts, or other documents . . . shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(Set forth fully in Appendix).

(4) Section 2(b) of the uniform bill of lading authorized by 49 U. S. C. § 11707(e) providing in relevant part:

> As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier . . . within nine months after delivery. . . . Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(Set forth fully in Appendix).

STATEMENT OF THE CASE.

On July 29, 1974, Wisconsin Packing shipped 582 boxes of frozen meat weighing 32,010 pounds. The boxes were shipped in an Indiana Refrigerator Lines ("IRL") truck destined for the Naval Supply Center at Norfolk, Virginia. Employees of Wisconsin Packing loaded the truck, closed it, and affixed the requisite seals. IRL provided the driver. The consignee rejected the load on arrival at Norfolk because the meat was found to be at 16.2° Fahrenheit, 1.2° Fahrenheit above the 15° Fahrenheit level specified as an acceptable tolerance in the handbook of military regulations. App. at A-16.

Following rejection, the truck returned to Wisconsin Packing's facilities in Milwaukee on August 2, 1974 where representatives of both IRL and Wisconsin Packing inspected the contents. Thereafter, Wisconsin Packing sent IRL the following letter:

> Wisconsin Packing Co. refuses to accept meat on trailer no. 4013 because of Army rejection of temperatures averaging 1.2° over acceptable allowance temperatures. Return temperature checked out and ranged from 9° to 25°.

App. at A-16.

That evening, the truck remained at Wisconsin Packing's facilities. The following morning, Wisconsin Packing directed IRL to deliver the truck to a cold storage facility where Wisconsin Packing's employees unloaded the contents. Wisconsin Packing proceeded to sell the meat in two separate sales, the last of which took place April 3, 1975 within nine months of the rejection. IRL was not advised of these sales. After the nine-month limitation had expired, Wisconsin Packing sent IRL a written claim specifying the amount of salvage and the net loss. This letter was received by IRL in June, 1975. At no time

within the nine-month limitation period was IRL informed as to the price or the amount of saleable meat. Appendix at A-17.

Wisconsin Packing sued IRL in the Circuit Court of Milwaukee County, Wisconsin on July 20, 1976. The action was removed to Federal District Court on August 23, 1976. IRL moved for Summary Judgment, whereupon a stipulation as to the following facts was presented:

> (1) The shipment involved in the instant proceeding was governed by the terms and conditions of the Uniform Domestic Straight Bill of Lading. . . .
>
> (2) That the only written document relative to the shipment in question submitted by Plaintiff Wisconsin Packing to Defendant Indiana Refrigerator Lines within the required nine-month time period was a letter dated August 2, 1974 addressed to Mr. James Stevenson signed by Mr. Karl Brown . . . [which is quoted in full above].
>
> (3) That relative to the shipment in question, Defendant had in its possession I. R. L. invoice No. 01647; I. R. L. Memo No. 59557; I. R. L. delivery receipt No. 59515. . . .

App. at A-17.

The District Court held that Summary Judgment in favor of defendant IRL was proper due to Wisconsin Packing's failure to file a written claim within the nine-month limitation period, noting that:

> Absent some further confirmation in writing from the plaintiff that it intended to file a claim or, at a minimum, an itemization of loss from plaintiff, the defendant was not chargeable with knowing that the plaintiff had in fact suffered any loss for which it sought reimbursement.

App. at A-17.

A panel of the Seventh Circuit with Judge Dudley B. Bonsal of the Southern District of New York sitting by designation, affirmed the lower court decision. *Wisconsin Packing Co., Inc.* v.

Indiana Refrigerator Lines, Inc., 604 F. 2d 1022, 1024 (7th Cir. 1979). The opinion written by Judge Bonsal distinguished the Seventh Circuit's decision in *Hopper Paper Co.* v. *Baltimore & O. R. Co.*, 178 F. 2d 179 (7th Cir. 1949). App. at A-17. Judge Cummings, in dissent, took a different view. App. at A-18. To the extent Judge Bonsal's opinion disagreed with *Hopper*, it was circulated among all judges in active duty on the court, and a majority did not favor a rehearing *en banc*. *Wisconsin Packing Co., Inc.* v. *Indiana Refrigerator Lines, Inc.*, 604 F. 2d 1022, 1024n. 1. (7th Cir. 1979). App. at A-18.

Later, following a subsequent petition, a majority of judges in regular active service voted for a rehearing *en banc*, whereupon the District Court's decision granting summary judgment was vacated. App. at A-18. This appeal followed.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW RUNS CONTRARY TO SUPREME COURT PRECEDENT.

The *Hopper* holding contradicts the Supreme Court's teachings in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592, 606 (1917); *Baltimore & O. R. R. Co.* v. *Leach,* 249 U. S. 217, 218 (1919); and *Gooch* v. *Short Line Railroad Co.,* 285 U. S. 22, 24 (1922) where this Court held that oral or verbal communication of a claim does not satisfy the written notice requirement of the Carmack Amendment, 49 U. S. C. § 11707(e).

In *Southern Pacific Co.* v. *Stewart,* 248 U. S. 446, 450 (1919), this Court ruled that "circumstances relied upon by shipper[s] [where the carrier has full knowledge of the damage] are inadequate to show a waiver by the carrier of written notice as required by . . . contract." Similarly, in *Gooch* v. *Oregon Short Line Railroad Co.,* 258 U. S. 22, 24 (1924), this Court held, "of course, too, actual knowledge on the part of employees of [a carrier is] . . . not an excuse for omitting the notice in writing."

In substituting actual knowledge for written notice, the *Hopper* Court relied on *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190 (1916). *Blish* did not in fact deal with "actual knowledge". Rather, it held for the plaintiff on the clearly expressed ground that "it appears that notice of the claim was in fact given." 241 U. S. at 197-98. The "writing" in question was a telegram which said "We will make claim against railroad for entire contents of car at invoice price." 241 U. S. at 193. The invoice price was $1,109.89. Judgment

was entered in the amount of $1,084.50. Upholding the lower court, this Court explicitly stated that a stipulation for timely notice,

> is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier, by its contracts, should require reasonable notice of all claims against it *even with respect to its own operations.* . . .

241 U. S. at 196 (emphasis added).

Blish, if anything, stands for the antithesis of actual knowledge. The *Blish* Court held that even if the carrier had actual knowledge of "its own operations", which would be true for most carriers in loss situations, such "actual knowledge" cannot be substituted for "reasonable notice." In *Blish*, "[T]he stipulation required that the claim should be made in writing. . . ." 241 U. S. at 198. This Court approved the validity and mandatory effect of the contractually imposed limitation period, stating:

> The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier, by its conduct, give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. . . . We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it.

241 U. S. at 197 [citations omitted]. *Hopper* runs contrary to these views.

II.

HOPPER DIRECTLY CONFLICTS WITH THE WRITTEN NOTICE VIEW HELD BY THE OTHER CIRCUITS.

The Seventh Circuit's decision in *Hopper* contradicts recent decisions of the Third and Tenth Circuits.

In *Perini-North River Associates* v. *Chesapeake & Ohio Ry. Co.*, 562 F. 2d 269, 273 (3rd Cir. 1977), the Court said:

> We do not question the accepted rule that actual knowledge on the part of the carrier cannot substitute for the written notice required by a bill of lading.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Littleton Leasing Co.*, 582 F. 2d 1237, 1240 (10th Cir. 1978), the Court said:

> *Even actual knowledge on the part of the carrier's employees would not dispense with the requirements of notice of claim in writing.*

(Emphasis added).

The so-called "*Hopper* rule" is no rule at all and never has been. The determining factors in *Hopper* were "the equities of the situation" which caused the *Hopper* court to blur the distinction between estoppel and actual knowledge. *Perini-North River Associates* v. *Chesapeake & Ohio Ry. Co.*, 562 F. 2d 269, 273 (3d Cir. 1977). The *Hopper* Court was influenced by the fact that "the carrier . . . had acknowledged in writing that damages were sustained by carelessness in transit." 582 F. 2d at 1240.

Hopper also emphasized that "that statute [49 U. S. C. § 11707(e)] . . . was not intended to operate as a statute of limitation," 178 F. 2d at 181, but as Judge Sprecher correctly pointed out in the dissent below, "[o]f course, the statute was not, but the significant fact is that it permitted carriers to impose a statute of limitations." App. at A-21. This Court in *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 222 (1931), stated that a bill of lading contract "made in pursuance of the Inter-

state Commerce Act . . . [has] in effect, the quality of a statute of limitation. . . ." 283 U. S. at 222.

The *Hopper* case has been accorded little respect in other jurisdictions and runs contrary to views long-expressed by those circuits. *Insurance Co. of North America* v. *Newtowne Mfg. Co.*, 187 F. 2d 675, 681 (1st Cir. 1951) ("*Hopper* . . . seems perhaps out of line with the other cases. . . ."); *Perini-North River Associates* v. *Chesapeake & O. Ry. Co.*, 562 F. 2d 269, 273 (3d Cir. 1977) ("*Hopper* . . . was considered a maverick decision. . . Most courts criticized *Hopper* . . . and demoted it to the ranks of cases distinguishable on their facts."); *Delphi Frosted Foods Corp.* v. *Illinois Central Ry. Co.*, 188 F. 2d 343, 345 (6th Cir. 1951) (*Hopper* . . . is based upon the peculiar facts of the case."); *East Texas Motor Freight Lines* v. *United States*, 239 F. 2d 417, 420 n. 10 (5th Cir. 1956) ("The holding of *Hopper* has been questioned in several cases."); *Northern Pacific Ry. Co.* v. *Mackie*, 195 F. 2d 641, 643 (9th Cir. 1952) (There were "unusual circumstances [in] that [*Hopper*] case. . . ."); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Littleton*, 582 F. 2d 1237, 1240 (10th Cir. 1978) (citing *Hopper* but not following it); *Henry Pratt Co.* v. *Stor Dor Freight Systems*, 416 F. Supp. 714, 715 (N. D. Ill. 1975) ("We do not believe *Hopper* should be extended beyond its peculiar facts. . .").

The *Hopper* case held that "failure to give notice of a claim for damages or loss in accordance with a stipulation in a contract for the shipment of goods is excused or is inapplicable where the carrier has or is chargeable with actual knowledge of all the conditions as to the damages that a written notice could give."[1] 178 F. 2d at 181.

Petitioner submits, as did the Court in *Conagra, Inc.* v. *Burlington Northern, Inc.*, 438 F. Supp. 1266, 1270 (D. Neb.

1. Petitioner respectfully submits that the dissent properly recognized the distinctions between *Hopper* and the instant case. Unlike *Hopper*, " 'all the conditions as to the damages' were not within the carrier's actual knowledge". App. at A-19.

1977), that "an extension of *Hopper* would result in a dubious precedent." A writ of certiorari must be granted in order that the precedent established in the *Hopper* case which is contrary to the teachings of this Court and numerous other courts, be reversed. A writ of certiorari is also essential to provide explicit guidance to shippers and carriers throughout the country in the proper handling of claims.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX.

618 F. 2d ..... (7th Cir. 1980)

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 78-2305

WISCONSIN PACKING CO., INC.,

Plaintiff-Appellant,

vs.

INDIANA REFRIGERATOR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 76-C-611—John W. Reynolds, *Judge.*

REHEARD EN BANC DECEMBER 3, 1979

DECIDED MARCH 18, 1980

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, SPECHER, TONE, BAUER, WOOD and CUDAHY, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This is the second time this case has been before this Court. In August 1979, a divided panel of this Court upheld the district court's summary judgment for defendant. 604 F. 2d 1022. On November 1, 1979, we granted plaintiff's petition for rehearing *en banc* and the case was

subsequently reargued before all active judges. We now vacate the district court's judgment and remand the cause for trial.

In this action under the Carmack Amendment to the Interstate Commerce Act (49 U. S. C. § 20(11)), plaintiff seeks $13,092.66 in damages arising from the U. S. Navy's rejection of approximately 33,465 pounds of frozen meat shipped by plaintiff via defendant carrier from Milwaukee, Wisconsin, to the Naval Supply Center in Norfolk, Virginia. With the allegations in plaintiff's affidavits taken as true for purposes of reviewing defendant's summary judgment motion.[1] the record in this case discloses the following: On July 29, 1974, plaintiff shipper transferred the goods to defendant for delivery at Norfolk on July 31. The plaintiff had previously had the meat tested for compliance with Navy temperature regulations and had specified that the carrier was to maintain the meat en route in a refrigerated trailer at zero degrees Fahrenheit (Plaintiff's Supp. App. 18). When the goods arrived at Norfolk on the appointed day, the Naval Supply Center refused delivery because the cargo temperature was 1.2 degrees over tolerances (Plaintiff's Supp. App. 19). Defendant immediately notified plaintiff of the rejection and subsequently brought the shipment back to Milwaukee, stopping in Pittsburgh so that the refrigeration unit on the trailer could be tested.

Defendant carrier retained exclusive possession of the meat during this period. Thus one of its representatives was present when the seals were broken and the trailer opened in Norfolk and he observed the tests that indicated the meat was not within acceptable military standards. A carrier representative was also present when the meat was returned to the shipper's Wisconsin premises on August 2. He remained there while the meat was

1. Summary judgment should not be granted where, as here, material facts are disputed. The district court and the dissent have accepted the defendant's version of the facts, but this opinion follows the rule that the facts must be viewed in favor of the plaintiff as the party opposing summary judgment. 6 Moore's Federal Practice (2d ed. 1976) ¶ 56.15[3] and the myriad of cases cited.

again tested and found to be 1.2 degrees over the required tolerances. Recognizing that the temperature of the meat represented a fatal deviation from the shipper's specifications, the carrier's agent chose not to investigate any further the circumstances surrounding the damage to the cargo. The shipper then refused the carrier's tender of the returned meat, and the carrier removed the trailer and its cargo from plaintiff's premises with the intention of attempting to resell the meat. Carrier representatives also rechecked the refrigeration unit on the trailer and continued to perform tests on the unit for three days. On August 5, the carrier's Milwaukee terminal manager advised the shipper he had been unable to dispose of the meat and the shipper agreed to take back the meat to dispose of on the carrier's behalf. Thereafter plaintiff kept the meat in cold storage, eventually selling it at a loss in two separate lots on September 30, 1974, and April 3, 1975, respectively.

During the August 2 examination of the trailer in Milwaukee, Karl Brown, one of plaintiff's local officers, orally informed James Stevenson, defendant's Milwaukee terminal manager, that the shipper would look to the carrier for reimbursement for the damage to the meat. Stevenson thereupon told Brown to prepare a letter "summarizing the situation." Accordingly, at the same meeting Brown handed Stevenson the following notice:

> "Wisconsin Packing Company refused to accept meat on trailer no. 4013 because of Army [Navy] rejection of temperatures averaging 1.2 degrees over acceptable allowance temperatures. Return temperatures checked out and ranged from nine to twenty-five degrees."

Stevenson accepted this letter which he apparently forwarded to defendant's headquarters in Muncie, Indiana, without comment. Neither he nor any other carrier representative ever sought additional information from plaintiff about the damage. The record also indicates that on April 10, 1975, shortly after the second lot of damaged meat was sold, Brown prepared on a formal claim notice an itemized list of plaintiff's losses (Attach-

ment to Record Items 4 and 5). It was stipulated below, however, that plaintiff and defendant exchanged no written notice other than the August 2 letter during the nine-month period after the refusal of the meat by the Navy.[2]

Defendant's refusal to honor plaintiff's claim for its losses from the Navy's rejection of the meat led plaintiff to file this action in the district court. Defendant moved for summary judgment, arguing that plaintiff had failed to file a written claim for damage within nine months, as required by the standard bill of lading. Finding that a notice of loss is not equivalent to a claim for damage, the district court held that the August 2 letter was insufficient to meet the writing requirement of the bill of lading. The court also concluded "as a matter of law" that defendant lacked the ~~a~~actual knowledge of a loss a written notice would have provided and that absent some further writing, plaintiff could not recover from defendant. Accordingly, Judge Reynolds entered summary judgment for defendant.

Congress adopted the Carmack Amendment to prevent carriers from insulating themselves from damage actions filed by shippers. Consequently, the Amendment requires carriers to issue a receipt or bill of lading for property received for transportation and makes the carrier liable to the lawful owner of the bill of lading for any damage caused by the carrier. The Amendment also makes it unlawful for the carrier to provide "a shorter period for the filing of claims than nine months [formerly four

2. The itemized claim notice contains several errors including the date "4/10/74" instead of "4/10/75" and a reference to a bill of lading dated August 12, 1974. That it refers to the goods at issue here is certain, for it properly identifies the parties, place of origin, and destination, lists the paid freight bill number, refers accurately to the quantity of meat contained in the two lots resold and establishes for the resale lots the correct circumstances of the loss. This claim form apparently was not delivered to the carrier immediately after it was drafted, but plaintiff was then confronted with an extended labor strike (Defendant's Supp. App. 28-30). Plaintiff filed a "supplemental claim" with defendant on May 30, 1975 (Defendant's Supp. App. 81-82, 107) which Judge Reynolds said he did not see (Defendant's Supp. App. 107). Nevertheless the two documents were probably one and the same.

months] and for the institution of suits than two years" from the date the carrier disallows the claim. 49 U. S. C. § 20(11). In the case at bar, the carrier's bill of lading provided this minimum period for filing claims and instituting suits, adding that "in case of failure to make delivery, then [a claim must be made] within nine months after a reasonable time for delivery has elapsed." The bill of lading also specified that the claim must be "in writing," although the Carmack Amendment neither requires written claims nor imposes any other restrictions on the form of notice.

The Supreme Court has indicated that a bill of lading requirement that claims be made "in writing" within a specified period of time will be enforced (*St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 593, 604-605), but the Court has also expressed a willingness to construe such writings liberally. Thus in *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, the Court stated that a bill of lading requiring written claims for losses within four months after the delivery of the property was intended simply "to secure reasonable notice" and "to facilitate prompt investigation." Accordingly, it held that a written notice that "sufficiently apprised the carrier of the character of the claim * * *" was adequate. The Court noted that compliance with the written notice provision of a bill of lading "does not require documents in a particular form," and that "it is addressed to a practical exigency and it is to be construed in a practical way." 241 U. S. at 198. Therefore it permitted the shipper in that case to recover even though its communications with the carrier consisted of a series of telegrams about the damage to the cargo, one of which stated a mere intention to file a claim at some later date.

The principle that emerges from *Blish* should dispose of this case. Although lacking in formality, plaintiff's August 2 letter gave defendant "reasonable notice." When "construed in a practical way," it clearly represented an attempt to formalize the claim inherent in plaintiff's refusal to take back the meat and

its oral assertions that defendant was at fault. It thus sufficed to advise the carrier that the shipper was seeking reimbursement for the loss. It is incontrovertible that the notice identified the goods by reference and set forth a formal statement of the damage. It is also apparent that the carrier not only was aware of the need to investigate, but actually conducted a thorough inquiry. Moreover, since the carrier had itself spent three days unsuccessfully endeavoring to dispose of the meat, it knew at least as well as the shipper what the maximum loss could be. Thus within a few days of the damage defendant had all the information necessary to protect its interests in the face of plaintiff's claim. Accordingly, the August 2 letter was "an adequate statement * * * deemed to satisfy this [written claim] requirement" of the bill of lading. 241 U. S. at 198.[3]

The carrier insists, however, that a prevailing Interstate Commerce Commission (ICC) regulation requires more formal notice than was available here. The section of the regulation relied on by the court below provides:

> "Bad order reports, appraisal reports of damage, notations of shortage or damage, or both on freight bills, delivery receipts, or other documents, * * * shall, standing alone, not be considered by carriers as sufficient to comply with

3. In light of *Blish*, it is evident that the words "I claim" or the like need not appear in the communication in order to comply with the writing requirement of a bill of lading. We must therefore reject as overly formalistic the strict dichotomy between a "claim" for damage and a "notice" of damage adopted in *Atlantic Coast Line R. Co.* v. *Pioneer Products, Inc.*, 256 F. 2d 431, 433 n. 3 (5th Cir. 1958). The relevant inquiry is rather whether the written communication alerts the carrier that reimbursement will be sought for the damage and does so in such a way as to permit the carrier to take the steps necessary to protect its interests. The results of this inquiry will vary with the specific context and the investigation will require a court to look to several factors, including course of dealing and performance, that might be relevant for construing the intent of the parties. See *American Synthetic Rubber Corp.* v. *Louisville & Nashville R. Co.*, 422 F. 2d 462, 468 (7th Cir. 1970). The presence or absence of certain objective considerations, including the detail in the notice and the actual knowledge available to the carrier, see discussion *infra*, will doubtless be highly significant in most cases.

> the minimum claim filing requirements [of the regulation]." 49 C. F. R. § 1005.2(c) reproduced in *Ex Parte No. 263,* 340 I. C. C. 515, 719 (1972).

That this provision is inapplicable to the case at bar becomes obvious when the regulation is viewed in its entirety. The central provision of the regulation states:

> "*A claim* for * * * damage to * * * cargo *shall not be voluntarily paid* by a carrier unless filed in writing * * * with the receiving or delivering carrier * * * within the specified time limits * * * required by law, [or by] the terms of the bill of lading * * *." 49 C. F. R. § 1005.2(a) reproduced in 340 I. C. C. at 718 (emphasis supplied).

The regulation also states that its provisions "shall govern the *processing* of claims for loss * * *." 49 C. F. R. 1005.1 reproduced in 340 I. C. C. at 718 (emphasis supplied). See also 340 I. C. C. at 553. Given the contrasting references in the accompanying legislative proposals to "disputed claims" and "claims determinations," see *e.g.,* 340 I. C. C. at 587, 588, 595, 596, it is apparent that the purpose of the regulation was to make claim *settlement* more expeditious by providing procedures for the *voluntary* disposition of claims by carriers. The formalities the regulation mandates serve the purpose of preventing carriers from discriminating among shipper customers by settling spurious or frivolous claims of certain shippers while rejecting bona fide claims of others. See 340 I. C. C. at 524, 529, 530, 544, 547-548, 553, 605, 606.

Thus far from controlling the form a notice must take here, the regulation does not even apply to a contested case such as this. Instead of attempting to regulate the process of judicial determination of claims, the ICC indicated that its intention was to encourage parties to follow formal procedures that would make it unnecessary for them to face the unattractive prospect of time-consuming, expensive and potentially unavailing litigation in the district courts. 340 I. C. C. at 553, 570, 613. Indeed, by submitting various legislative proposals to increase its role

in claims determination, the Commission expressed its doubts about its authority to erect substantive barriers to legal claims recovery. The regulation therefore presents no obstacle to plaintiff's case.

Even if the regulation were to apply, plaintiff could demonstrate its compliance. First, because careless wording in Section 1005.2(c) of the regulation renders precise interpretation impossible, it is not clear that the provision precludes a claim based on the notice available here. The sufficiency of the plaintiff's August 2 letter under the regulation gains force from the ICC's own recognition that, as here, a shipper often does not know the extent of the damage until long after delivery and must therefore have the opportunity to file a supplemental notice. 340 I. C. C. at 555. The ICC thus seems to have anticipated that an initial claim notice may provide no more than was available to defendant in this case.

In *Gay* v. *Graves Truck Line, Inc.*, 573 P. 2d 632 (Kan. Ct. App. 1977), the court held the regulation did not bar a consignee from recovering, although the only written communication between the parties during the nine-month period was an inspection report sent by the carrier to the consignee regarding the damage. The court noted that plaintiff filed a supplemental claim ten months later when the actual damages became precisely known. Similarly here, plaintiff supplemented its original letter with the formal claim dated April 10, 1975, a claim notice that unquestionably met the requirement of the regulation. This notice apprised the carrier of the actual losses shortly after they became known. The maximum sixty days between the time plaintiff learned of the actual damages and the receipt of that claim by the carrier (see note 2 *supra*) was only slightly longer than the comparable period in *Gay* and, more importantly, the actual time between the loss and full notice was about the same.[4] It is significant, moreover, that as

4. The loss occurred on August 2, 1974, when plaintiff refused the meat. Under defendant's theory full notice was due May 2, and it was received May 30 according to the district judge (Defendant's Supp. App. 107).

noted the bill of lading here stated that the time for filing a claim would be nine months from the date of delivery but "in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed." The Navy's refusal of the meat might well be viewed as within the kind of "failure to make delivery" contemplated by that provision (compare *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. at 196) and the shipper's difficulty in finding a substitute market for the meat could affect the calculation of a "reasonable time" so as to make the delay here immaterial.

The case law does not demonstrate the insufficiency of the plaintiff's notice. In fact, a number of these cases cited by defendant support the proposition that the form of the written notice is less important than its adequacy in affording the carrier an opportunity to inspect the damaged goods. For example, in *Miller* v. *Aaacon Auto Transport, Inc.*, 447 F. Supp. 1201 (S. D. Fla. 1978), the court held that informal letter from the shipper to the carrier were sufficient notice. It concluded:

> "The purpose of the written claim requirement is not to avoid the payment of just claims, but to facilitate prompt investigation of claims and insure equality of treatment among shippers.
>
> * * * * *
>
> "[T]he requirement is satisfied if the written instruments supply 'sufficient information upon which a prompt and complete investigation may be based.' " 447 F. Supp. at 1204 (citations omitted).

Accord, *American Synthetic Rubber Corp.* v. *Louisville & Nashville R. Co.*, 422 F. 2d 462, 468-469 (6th Cir. 1970); *Loveless* v. *Universal Carloading & Distributing Co.*, 225 F. 2d 637, 639 (10th Cir. 1955); *Thompson* v. *James G. McCarrick Co.*, 205 F. 2d 897, 900, 901 (5th Cir. 1953); *Rollei of America, Inc.* v. *T.I.M.E.—DC, Inc.*, 357 A. 2d 33, 35 (N. J. Super. 1976); see also *Atchison, T. & S. F. Ry. Co.* v. *Littleton Leas-*

ing and Investment Co., 582 F. 2d 1237, 1240 (10th Cir. 1978).

Perhaps for this reason courts have been more liberal in finding compliance with a claim procedure as the carrier's actual knowledge of the facts surrounding the claim increases. See *Conagra, Inc.* v. *Burlington Northern, Inc.*, 438 F. Supp. 1266, 1269 (D. Neb. 1977).[5] Such an approach not only reflects a practical understanding of how a prudent carrier should and would construe a written notice when it is fully aware of the circumstances and extent of loss, but also comports with the equities of the situation. A carrier is surely less entitled to block recovery when its own acts or omissions have created a situation in which processing a claim is more difficult. Indeed, such considerations have given rise under other circumstances to an estoppel defense for shippers when carriers assert failure to comply with time limitations. *Perini-North River Assocs.* v. *Chesapeake & Ohio Ry. Co.*, 562 F. 2d 269, 272 (3d Cir. 1977);[6] see also *Hopper Paper Co.* v. *Baltimore & O. R. Co.*, 178 F. 2d 179 (7th Cir. 1949), certiorari denied, 339 U. S. 943.

If under the policies behind the notice requirement, actual knowledge or a full inquiry on the part of the carrier may but-

5. See also *Littleton Leasing, supra,* in which the court acknowledged that compliance with the bill of lading provision has been found when "there were actual dealings with claim agents of the carrier aside from some type of written notice." 582 F. 2d at 1241 (citing cases).

6. *Perini* held that a carrier's conduct estopped it from raising the defense that a written claim had been filed later than the nine months specified in the bill of lading where, as here, the carrier had actual knowledge of the extent of the damage. The case answers the question expressly left open in *Chesapeake & Ohio Ry. Co.* v. *Martin*, 383 U. S. 209, "[w]hether under any circumstances the shipper may rely upon the [estoppel] doctrine in avoidance of the time limitation clause of the bill of lading." 383 U. S. at 222. Absent some further word from the Supreme Court, the dissent's statement that the Supreme Court "now simply requires compliance with the minimum time limits of the Carmack Amendment" is erroneous. Moreover, defendant's conduct in this case would seem sufficient to invoke the doctrine of estoppel here.

tress a shipper's claim when the written notice is informal or perhaps even nonexistent, the obverse is also true: the complete absence of such actual knowledge of the damage or its extent will vitiate a claim unless the writing gives a precise basis for investigation. Not surprisingly, then, the absence of any reason for the carrier to know of the damage or its extent has been a salient characteristic of many of the cases (including those cited by the defendant) in which claims have been denied. *East Texas Motor Freight Lines* v. *United States,* 239 F. 2d 417 (5th Cir. 1956); *Northern Pacific Ry. Co.* v. *Mackie,* 195 F. 2d 641 (9th Cir. 1952); *Delphi Frosted Foods Corp.* v. *Illinois Central R. Co.,* 188 F. 2d 343 (6th Cir. 1951), certiorari denied, 342 U. S. 833; *Insurance Co. of North America* v. *Newtowne Mfg. Co.,* 187 F. 2d 675 (1st Cir. 1951); *MGD Graphics Systems Americas Co.* v. *Acme Fast Freight, Inc.,* No. 76 C 1605 (N. D. Ill. decided by unreported opinion on May 16, 1977); *Henry Pratt Co.* v. *Stor Dor Freight Systems, Inc.,* 416 F. Supp. 714 (N. D. Ill. 1975). Under these circumstances, the dissent's reliance on *Atchison, T. & S. F. Ry. Co.* v. *Littleton Leasing and Investment Co.,* 582 F. 2d 1237 (10th Cir. 1978), is misplaced. First, although a majority of the Tenth Circuit panel held the shipper's notice in *Littleton Leasing* was deficient, it acknowledged the general principles we have set forward as applicable to such cases, stating

> "Generally any written document, however informal, which indicates a claim for damages is asserted, and identifies the shipment, will be adequate. *Georgia, Florida & Alabama Ry.* v. *Blish Milling Co.,* 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 984; *American Synthetic Rubber Corp.* v. *Louisville & N. R. R.,* 422 F. 2d 462 (6th Cir.). In accordance with this liberal attitude, we have held the requirement of a claim in writing has been satisfied where the carrier had inspected the damaged property noting the apparent damage, had acknowledged in writing that damages were sustained by carelessness in transit, and had agreed that a formal claim could be filed when itemized damages were ascertained. *Loveless* v. *Universal Carload-*

ing & Distributing Co., 225 F. 2d 637 (10th Cir.)." 582 F. 2d at 1240.

Second, and more important, unlike the case at bar, *Littleton Leasing* involved a situation in which the notice involved was sketchy *and* the carrier lacked any independent means of gaining information about the damage. Indeed, the damage to the goods in that case was not discovered until after delivery. Thus the meager communications from the shipper in *Littleton Leasing* were insufficient to provide the carrier with the additional information it needed to protect its interests.

We are not postulating a general rule that some actual knowledge must exist for an informal notice to be effective any more than we wish to decide whether some writing is always required. We find only that the combination of actual and written notice in this case is sufficient. Accordingly we need not reconsider the specific holding of *Hopper Paper Co.* v. *Baltimore & O. R. Co.*, 178 F. 2d 179 (7th Cir. 1949), certiorari denied, 339 U. S. 943. Since there was more than mere actual notice in this case, to overrule *Hopper* would be inappropriate, particularly insofar as that case helps illuminate the role actual notice can play in an evaluation of the overall situation.[7]

To sum up, the bill of lading merely required written claim of damage without any further specificity (Defendant's Supp. App. 112). Since under the plaintiff's version of the facts the

7. *Hopper* is not the derelict the dissent implies it is. *Hopper* was consistent with and cited *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396 (2d Cir. 1927), certiorari denied, 275 U. S. 571, and was discussed with approval in *Loveless* v. *Universal Carloading & Distributing Co., Inc.*, 225 F. 2d 637 (10th Cir. 1955). *Hopper* was also followed in *Delaware, L. & W. R. Co.* v. *United States*, 123 F. Supp. 579 (S. D. N. Y. 1954); *Stearns-Roger Corp* v. *Norfolk & Western Ry. Co.*, 356 F. Supp. 1238 (N. D. Ill. 1973); *MGD Graphics Systems Americas Co.* v. *Acme Fast Freight, Inc.*, 437 F. Supp. 10 (N. D. Ill. 1977). As the dissent notes, some of the cases citing *Hopper* have properly distinguished it, absent a situation in which the carrier had the kind of actual knowledge available in *Hopper*. It is worth noting that here defendant also had such knowledge.

carrier received oral notice of the claim and had actual knowledge of the fact of the damage, the extent of the damage and the reasons for the rejection by both the consignee and the shipper, a more complete written notice than was contained in the August 2, 1974, letter was unnecessary. That notice was delivered to the carrier well within the nine months specified by the bill of lading. Allowing the shipper an opportunity to recover is consistent with the prevailing case law and does not run afoul of the ICC regulation which, with its concern about the improper preferences or discrimination that can occur in voluntary settlements, has no application to this case. Under these circumstances, summary judgment for the carrier gave it an improper windfall.

This conclusion does not mean that a notice such as the August 2 letter would be appropriate under other circumstances. Although the requirements of the standard bill of lading do not include the use of any particular words for claiming damage (see note 3 *supra*), it is ordinarily essential for the shipper to indicate to the carrier that it will be looked to for reimbursement. In this case, however, plaintiff has alleged defendant's actual knowledge and an oral assertion of liability, and assuming the plaintiff can prove the facts supporting these allegations, these circumstances, along with the language of refusal in the August 2 letter, would warrant a finding that the shipper has fulfilled the notice requirement. Accordingly, the cause should be remanded for trial on this issue and the merits of the claim. Circuit Rule 18 shall apply.[8]

Judgment vacated; cause remanded for trial.

SPRECHER, *Circuit Judge*, with whom PELL, *Circuit Judge*, joins, dissenting. I respectfully dissent and I would overrule the *Hopper Paper Co.* case.

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8. The defendant's April 23, 1979, motion to strike additional authority filed April 18, 1979, is denied. Inadvertently the panel opinion did not dispose of this motion.

I.

At one time, common carriers reduced their exposure to liability in various ways, including a contractual requirement that claims for loss or damage be made in writing within an exceedingly short time, such as 36 hours or a few days. The Supreme Court upheld the validity of such contractual stipulations "where reasonable in their terms." See *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, 606 (1917), holding 36 hours to be reasonable. See also *Erie R. R. Co.* v. *Stone*, 244 U. S. 332, 334 (1917), holding five days to be reasonable and listing at page 336 numerous prior Supreme Court cases validating the "binding force of these contracts."

The third proviso of the second sentence of the Carmack Amendment to the Interstate Commerce Act, amended on March 4, 1915, 38 Stat. 1196, 49 U. S. C. § 20(11), (known as the Cummins Amendment), made it unlawful for a contractual stipulation to provide a shorter period than four months for the filing of claims. In 1930, this proviso was amended in order to extend the time for filing claims from at least four months to at least nine months. 46 Stat. 251. The third proviso at the time of the occurrences in this case read as follows:

> *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice . . . .

49 U. S. C. § 20(11).

The Interstate Commerce Act was revised, codified, and enacted, without substantive change, as subtitle IV of title 49 of the United States Code on October 17, 1978, after the present occurrences. The new codification provides that an action taken

under a law replaced by it shall be deemed to have been taken under the new codification. The new codification of the third proviso of the second sentence of the Carmack Amendment appears as 49 U. S. C. § 11707(e) and now reads as follows:

> A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

The statute does not require that a claim be in writing or that it be filed in at least nine months, but it permits the contracting parties, the shipper and carrier, to enter into a contract with such requirements. The shipment involved in the present case was delivered pursuant to a Uniform Bill of Lading, section 2(b) of which specifies:

> As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier . . . within nine months after delivery . . . . Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

In interpreting bills of lading pursuant to the Carmack Amendment, the Supreme Court merely has continued its former established practice of upholding the validity of contractual stipulations in bills of lading, except that instead of requiring reasonableness it now simply requires compliance with the minimum time limits of the Carmack Amendment. In *Chesapeake & Ohio Ry. Co.* v. *Martin,* 283 U. S. 209, 222 (1931) the Court said:

> But the *Blish Company* case [*Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190 (1916)] makes clear that the fact that delivery was made contrary to instructions, due to the misunderstanding or negligence of the carrier, cannot successfully be set up as an estoppel

against the claim of a failure to comply with the requirement of the bill of lading here involved. To allow it would be to alter the terms of a contract, made in pursuance of the Interstate Commerce Act and having, in effect, the quality of a statute of limitation, and thus to open the door for evasions of the spirit and purpose of the act to prevent preferences and discrimination in respect of rates and service. Compare *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667.

II.

On July 29, 19[redacted] the plaintiff shipped 582 boxes of frozen ground meat weighing [redacted] pounds by means of defendant's trailer-tractor truck, for delivery to the United States Naval Supply Center at Norfolk, Virginia. The plaintiff loaded the truck itself, closed the truck door and affixed the required seals. The defendant provided the driver. The shipment was rejected by the consignee on arrival in Virginia on July 31, for the reason that the meat was found to be 1.2 degrees Fahrenheit over the acceptable t[redacted]rances set forth in the handbook of military regulations—namely 16.2 degrees.

The truck returned to plaintiff's facilities in Milwaukee on August 2, 1974, where representatives of both plaintiff and defendant inspected the contents. The plaintiff then delivered to the defendant the following letter:

> Wisconsin Packing Company refuses to accept meat on trailer no. 4013 because of Army rejection of temperatures averaging 1.2 degrees over acceptable allowance temperatures. Return temperatures checked out and ranged from nine to twenty-five degrees.

However, that night the trailer remained at plaintiff's facilities and the next day plaintiff instructed the defendant to deliver the trailer to a cold-storage facility, where it was unloaded by plaintiff's representatives. The plaintiff sold the meat thereafter in two separate sales, the last occurring on April 3, 1975, within the

nine month period, but did not advise the defendant. A written claim specifying the amount of the salvage and the net loss was received by the defendant in June, 1975, after the nine-month limitation. At no time within the nine-month period was the defendant advised at what price or for what amount the obviously saleable meat was sold.

On July 20, 1976, the plaintiff sued the defendant in the Circuit Court of Milwaukee County, Wisconsin, from where it was removed to the federal district court on August 23, 1976. The defendant moved for summary judgment and by agreement of counsel, the following stipulation of facts was presented to the district court:

> (1) The shipment involved in the instant proceeding was governed by the terms and conditions of the Uniform Domestic Straight Bill of Lading . . . .
>
> (2) That the only written document relative to the shipment in question submitted by Plaintiff, Wisconsin Packing to Defendant, Indiana Refrigerator Lines within the required nine month time period was a letter dated August 2, 1974, addressed to Mr. James Stevenson and signed by Mr. Karl Brown . . . [which is quoted in full above].
>
> (3) That relative to the shipment in question, Defendant had in its possession I. R. L. invoice No. 01647; I. R. L. memo No. 59557; I. R. L. delivery receipt No. 59515 . . . .

The district court entered summary judgment for the defendant for failure of the plaintiff to file a written claim within nine months, noting that:

> Absent some further confirmation in writing from the plaintiff that it intended to file a claim or, at a minimum, an itemization of loss from plaintiff, the defendant was not chargeable with knowing that the plaintiff had in fact suffered any loss for which it sought reimbursement.

The panel of this court affirmed the district court judgment, distinguishing this court's decision in *Hopper Paper Co.* v.

Baltimore & O. R. Co., 178 F. 2d 179 (7th Cir. 1949), *cert. denied*, 339 U. S. 943 (1950). A dissent by Judge Cummings took a different view. See *Wisconsin Packing Co., Inc.* v. *Indiana Refrigerator Lines, Inc.*, 604 F. 2d 1022, 1024 (7th Cir. 1979) (Cummings, J., dissenting). Insofar as the opinion may have disagreed with *Hopper*, it was circulated among all judges of the court in regular active service and a majority did not favor a rehearing in banc on that question. *Id.* at 1024 n. 1.

Subsequently, when a petition for rehearing with a suggestion for rehearing in banc was filed by the plaintiff, a majority of judges in regular active service voted for a rehearing in banc.

III.

In the *Hopper Paper Co.* case, the plaintiff's property was negligently destroyed in a train wreck between two of the defendant's trains, the carrier notified plaintiff of the disaster and then sold the salvage without the plaintiff's knowledge and pocketed the proceeds. As one of our sister circuits observed, "[t]he court was obviously concerned with the equities of the situation . . . ." *Perini-North River Associates* v. *Chesapeake & Ohio Ry. Co.*, 562 F. 2d 269, 273 (3d Cir. 1977).

In the present case, the truck was loaded, closed and sealed by the plaintiff; the contents were not destroyed nor even shown to have immediately been damaged, inasmuch as the Navy rejected them because of the temperature rather than the condition of the meat; although the plaintiff wrote a letter refusing to accept the meat, it was at all times in the control of the plaintiff; the next day plaintiff instructed the defendant to move the truck to cold-storage facilities where plaintiff unloaded the meat; and plaintiff eventually sold the meat and did not timely advise the defendant of the fact or amount of the sale. At no time within nine months did the defendant know or was it advised by the plaintiff as to the value of the meat, the saleability of it or the fact of a loss. In fact, in inflationary times

there is no logical reason to assume that a later sale of the meat might not bring a greater amount than the original attempted sale to the Navy. Thus, within nine months the defendant was not given notice of, nor did it have actual knowledge of, any fact whatsoever which would lead it to believe that the defendant had indeed suffered a loss, or if so, the amount of that loss.

The *Hopper Paper Co.* case held that "failure to give notice of a claim for damages or loss in accordance with a stipulation in a contract for the shipment of goods is excused, or is inapplicable, where the carrier has or is chargeable with actual knowledge of all the conditions as to the damages that a written notice could give." 178 F. 2d at 181. The present case is distinguishable from *Hopper* in that "all the conditions as to the damages" were not within the carirer's actual knowledge. Beyond that, however, the *Hopper* statement, which is described as a "general rule," is clearly erroneous on its face and contrary to all relevant Supreme Court authority.

In the first place, *Hopper* relies principally upon *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190 (1916), for its substituting of actual knowledge for written notice. *Blish* did not deal at all with actual knowledge but instead held for the plaintiff on the clearly expressed ground that "it appears that notice of the claim was in fact given." *Id.* at 197-98. The crucial writing was a telegram which said, "We will make claim against railroad for entire contents of car at invoice price." *Id.* at 193. The invoice price of $1,109.89 was attached to the bill of lading and the ultimate verdict in favor of the shipper was for $1,084.50. The Supreme Court said:

> [The stipulation for a timely written notice] is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it *even with respect to it own operations* . . . .

Id. at 196 (emphasis added).

This is the very antithesis of actual knowledge. The Court is saying that even if the carrier had actual knowledge of "its own operations," which is true in most loss claims against carriers, such actual knowledge could not be substituted for "reasonable notice." The *Blish* Court emphasized that "[t]he stipulation required that the claim should be made in writing . . . ." *Id.* at 198. Finally, in order to leave no doubt as to the validity and mandatory effect of the bill of lading contractual stipulation, the Court said:

> But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed . . . . We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it.

Id. at 197 [citations omitted].

The Supreme Court has found non-compliance with the written notice requirement where the actual knowledge of the carrier has been accomplished through the oral or verbal communications of the shipper. *St. Louis Iron Mountain & Southern Ry. Co.* v. *Starbird,* 243 U. S. 592, 606 (1917); *Baltimore & Ohio R. R. Co.,* v. *Leach,* 249 U. S. 217, 218 (1919).

In *Southern Pacific Co.* v. *Stewart,* 248 U. S. 446, 450 (1919), the Court found that "the circumstances relied upon by the shipper [that the carrier had full knowledge of the damage] are inadequate to show a waiver by the carrier of written notice as required by the contract." In *Gooch* v. *Oregon Short Line Railroad Co.,* 258 U. S. 22, 24 (1922), the Court said:

> Of course too, actual knowledge on the part of employees of the [railroad] company was not an excuse for omitting the notice in writing.

Recently both the Third and Tenth Circuits have reconfirmed this rule. In *Perini-North River Associates* v. *Chesapeake & Ohio Ry Co.*, 562 F. 2d 269, 273 (3d Cir. 1977), the Court said:

> We do not question the accepted rule that actual knowledge on the part of the carrier cannot substitute for the written notice required by a bill of lading.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Littleton Leasing Co.*, 582 F. 2d 1237, 1240 (10th Cir. 1978), the Court said:

> Even actual knowledge on the part of the carrier's employees would not dispense with the requirement of notice of claim in writing.

Thus, the "general rule" of *Hopper* is no rule at all and never has been. In fact, the determining factors for the result in *Hopper* were, as in the *Perini* court indicated, "the equities of the situation" which caused this court to blur the distinction between estoppel and actual knowledge. *Perini*, 562 F. 2d at 273. And, as the *Atchison* court observed, the *Hopper* court was influenced by the fact that "the carrier . . . had acknowledged in writing that damages were sustained by carelessness in transit," 582 F. 2d at 1240, that is, the carrier's telegram in that case to the consignor that the damage had occurred due to a collision of two of its own trains.

In the second place, *Hopper* emphasized that "the statute . . . was not intended to operate as a statute of limitation." 178 F. 2d at 181. Of course the statute was not, but the significant fact is that it permitted carriers to impose a statute of limitations. As noted above, the Supreme Court in the *Chesapeake & Ohio Ry. Co.* v. *Martin* case stated that the bill of lading contract was "made in pursuance of the Interstate Commerce Act and [had] in effect, the quality of a statute of limitation. . . ." 283 U. S. at 222.

In the third place, the *Hopper* case has not been accorded much respect by other federal courts. Virtually every citation of *Hopper* by other courts either criticizes it or holds it narrowly to its facts.[1]

Hopper could be held narrowly to its facts and distinguished here but I would perfer to overrule it completely inasmuch as it is so directly contrary to all Supreme Court teaching.

I would affirm the lower court's judgment.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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1. *Insurance Co. of North America* v. *Newtowne Mfg. Co.*, 187 F. 2d 675, 681 (1st Cir. 1951) ("*Hopper* . . . seems perhaps out of line with the other cases . . . "); *Perini-North River Associates* v. *Chesapeake & O. R. Co.*, 562 F. 2d 269, 273 (3d Cir. 1977) ("*Hopper* . . . was considered a maverick decision . . . . Most courts criticized *Hopper* . . . and demoted it to the ranks of cases distinguishable on their facts."); *Delphi Frosted Foods Corp.* v. *Ill. Cen. R. Co.*, 188 F. 2d 343, 345 (6th Cir. 1951) ("*Hopper* . . . is based upon the peculiar facts of the case."); *East Texas Motor Freight Lines* v. *U. S.*, 239 F. 2d 417, 420 n. 10 (5th Cir. 1956) ("The holding of *Hopper* has been questioned in several cases."); *Northern Pac. Ry. Co.* v. *Mackie*, 195 F. 2d 641, 643 (9th Cir. 1952) (There were "unusual circumstances [in] that [*Hopper*] case . . . ."); *Atchison, T. & S. F. R. Co.* v. *Littleton*, 582 F. 2d 1237, 1240 (10th Cir. 1978) (cites *Hopper* but does not follow it: "compliance with the written notice requirement of . . . the bill of lading is mandatory."); *Henry Pratt Co.* v. *Stor Dor Freight Systems*, 416 F. Supp. 714, 715 (N. D. Ill. 1975) ("We do not believe that *Hooper* . . . should be extended beyond its own particular facts . . . ."); *Conagra, Inc.* v. *Burlington Northern, Inc.*, 438 F. Supp. 1266, 1270 (D. Neb. 1977) ("The *Hopper* case has been widely criticized . . . [A]n extention of *Hopper* would result in a dubious precedent.").

604 F. 2d 1022 (7th Cir. 1979)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2305

WISCONSIN PACKING CO., INC., a Wisconsin Corporation,
Plaintiff-Appellant,

vs.

INDIANA REFRIGERATOR LINES, INC., an Indiana Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 76-C-611—John W. Reynolds, *Judge.*

ARGUED APRIL 13, 1979—DECIDED AUGUST 10, 1979

Before CUMMINGS and SPRECHER, *Circuit Judges,* and BONSAL, *Senior District Judge.**

BONSAL, *Senior District Judge.*

Wisconsin Packing Co., ("Wisconsin Packing"), plaintiff-appellant, appeals from an order of the district court granting defendant-appellee, Indiana Refrigerator Lines', ("IRL"), motion for summary judgment.

On July 29, 1974, a shipment of 32,010 pounds of frozen meat was tendered by Wisconsin Packing to IRL for shipment from Milwaukee to the Naval Supply Center in Norfolk, Virginia. On July 31, 1974, the Navy rejected the shipment claim-

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* Senior District Judge Dudley B. Bonsal of the Southern District of New York is sitting by designation.

ing that the temperature of the meat was 1.2 degrees Fahrenheit over the acceptable tolerance standard set forth in the handbook of military regulations. IRL returned the shipment to Wisconsin Packing in Milwaukee, which refused to accept it. On August 2, 1974, Mr. Karl Brown, an officer of Wisconsin Packing, wrote Mr. James Stevenson, Milwaukee Terminal Manager for IRL, as follows:

> "Wisconsin Packing Company refuses to accept meat on trailer no. 4013 because of Army rejection of temperatures averaging 1.2 degrees over acceptable allowance temperatures. Return temperatures checked out and ranged from nine to twenty-five degrees."

Wisconsin Packing eventually disposed of the shipment.

On July 20, 1976, Wisconsin Packing brought this action against IRL pursuant to the Interstate Commerce Act, 49 U. S. C. § 20(11) claiming damages in the amount of $13,192.66.

On September 5, 1978, the district court granted IRL's motion for summary judgment on the grounds (1) that Wisconsin Packing failed to give IRL sufficient written notice of its claim within nine months of the occurrence of the damage as required by the Uniform Bill of Lading and the Interstate Commerce Act and regulations issued thereunder; and (2) that IRL was not chargeable with actual knowledge of all the conditions as to the alleged damages that a written notice would have provided and which would have excused the lack of formal notice under *Hopper Paper Co.* v. *Baltimore & O. Ry.*, 178 F. 2d 179 (7th Cir. 1949), *cert. denied*, 339 U. S. 943 (1950).

With respect to the first ground, the district court held that the August 2, 1974 letter, the only written communication made by Wisconsin Packing within the nine-month period, and the invoices held by IRL indicating that the shipment had been rejected did not constitute sufficient written notice of claim because they did not identify the shipment with sufficient specificity nor state that IRL was liable for damages nor the

specific amount of damages that would be claimed. In its appeal, Wisconsin Packing contends that the district court erred in determining that Wisconsin Packing had not provided IRL with sufficient written notice of its claim of damage. Moreover, Wisconsin Packing contends that written notice was not necessary since IRL had actual knowledge of Wisconsin Packing's claim (*Hopper, supra*) and that disputed issues of fact as to the applicability of *Hopper* precluded the granting of summary judgment.

We agree with the district court that the letter of August 2, 1974 from Wisconsin Packing and the invoices did not constitute a sufficient written notice of claim within the meaning of the Interstate Commerce Act and regulations thereunder. The shipment was evidenced by a Uniform Bill of Lading which provided that Wisconsin Packing was obligated to give IRL written notice of claim for loss or damage no later than nine months after the damage allegedly occurred. The regulations promulgated by the Interstate Commerce Commission, 49 C. F. R. § 1005, 37 Fed. Reg. 4258 (1972), provide in part that any notice of claim for loss or damage shall be in writing, contain facts sufficient to identify the shipment involved, assert liability for alleged loss or damage, and make claim for the payment of a specified or determinable amount of money. 49 C. F. R. § 1005.2(b). Moreover, 49 C. F. R. § 1005.2(c) provides:

> "(c). *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortages or damage, or both, on freight bills, delivery receipts, or other documents . . . shall standing alone not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

Although the Interstate Commerce Commission states that such regulations "shall govern the processing of claims for loss, damage, injury or delay to property . . . in interstate or foreign commerce . . . subject to the Interstate Commerce Act," (49

C. F. R. § 1005.1), they provide the Court with a useful guide as to what should constitute a sufficient notice of claim. 49 C. F. R. § 1005.2(b). *See Henry Pratt Co.* v. *Stor Dor Freight Systems, Inc.*, 416 F. Supp. 714 (N. D. Ill. 1975). We agree with the district court that the letter of August 2, 1974 and the invoices did not meet the requirements of the Interstate Commerce Act and regulations promulgated thereunder.

Since the purpose of the written notice is to alert the carrier of the damage and allow it an opportunity to make a full investigation (*Georgia, Florida & Alabama Railway* v. *Blish Milling Co.*, 241 U. S. 190 (1916)), we held in *Hopper*, which was decided before the relevant regulations were promulgated, that despite the need for a written claim as required by the Uniform Bill of Lading and the Interstate Commerce Act, a failure to give the statutory notice of a claim for damage is excused "where the carrier has or is chargeable with actual knowledge of all the conditions as to the damages that a written notice could give." 178 F. 2d at 181. *Accord, MGD Graphic Systems Americas Co.* v. *Acme Fast Freight, Inc.*, 437 F. Supp. 10 (N. D. Ill. 1977); and *Stearns-Roger Corp.* v. *Norfolk & Western Railway*, 356 F. Supp. 1238 (N. D. Ill. 1973). In *Hopper*, we held that the carrier had actual knowledge of the facts which a written notice would have provided. There the shipment of paper was destroyed in a collision between two trains of the defendant carrier which then gave notification of the loss to both the consignor and consignee. We upheld the district court's finding that:

> "[d]efendant knew that it had destroyed such paper and had at least as much if not more knowledge in relation to the damage in question as plaintiff." 178 F. 2d at 181.

The only document submitted by Wisconsin Packing to IRL within the nine-month period was the letter of August 2, 1974. Although there was a dispute as to whether an agent of Wisconsin Packing told IRL on August 2, 1974 that Wisconsin Packing would be seeking reimbursement for its losses, the district court assumed this to be true for the purposes of the summary judg-

ment motion. Under these circumstances, IRL merely had knowledge of the fact of damage, while in *Hopper* the defendant had full knowledge of all the conditions of the damage. Accordingly, summary judgment was properly granted to IRL.[1]

AFFIRMED.

1. Insofar as this opinion may disagree with *Hopper Paper Co.* v. *Baltimore & O. Ry.*, 178 F. 2d 179 (7th Cir. 1949), it has been circulated among all judges of this court in regular active service. A majority did not favor a rehearing in banc on that question.

CUMMINGS, *Circuit Judge,* dissenting. As noted in the majority opinion, plaintiff shipper sued defendant motor carrier for $13,192.66 damages caused by defendant's delivery of 32,340 pounds of frozen meat in Norfolk, Virginia, "in a damaged condition unsuitable for human consumption or for purchaser's use."[1] The suit was brought under Section 20(11) of the Interstate Commerce Act (49 U. S. C. § 20(11)), known as the Carmack Amendment, making carriers liable for damage to shippers' property despite any attempted exemption from liability by the carrier.

The statute does not require shippers to file their claim in writing. The bill of lading, however, requires written notice of claims to be sent to the carrier within nine months of the loss. The Supreme Court has held that such a requirement in a bill of lading is enforceable, but that no special form is required. Informal notice is adequate as long as it affords the carrier an opportunity to investigate the circumstances of the loss. *Georgia, Florida & Alabama Railway Company* v. *Blish Milling Company,* 241 U. S. 190; *St. Louis, Iron Mountain and Southern Railway Company* v. *Starbird,* 243 U. S. 592. Additionally, this Court held in *Hopper Paper Co.* v. *Baltimore & Ohio R. Co.,* 178 F. 2d 179 (7th Cir. 1949), certiorari denied, 339 U. S. 943, that actual notice of the loss is adequate, even though the shipper apparently sent no writing at all to the carrier within the specified time.[2] A number of the cases cited by the defendant in fact support the proposition that the form of the written notice is irrelevant and that the carrier's opportunity to inspect the damaged goods is the key factor. In *Miller* v. *Aaacon Auto Transport,* 447 F. Supp. 1201 (S. D. Fla. 1978), for example, the court held that informal letters

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1. Par. 7 of amended complaint.

2. The result in *Hopper* was approved in *Perini-North River Associates* v. *Chesapeake & Ohio Railway Co.,* 563 F. 2d 269 (3d Cir. 1977), where the court held that the carrier was estopped to raise the lack of written notice as a defense.

from the shipper to the carrier were sufficient notice. It concluded:

> "The purpose of the written claim requirement is not to avoid the payment of just claims, but to facilitate the prompt investigation of claims and insure equality of treatment among shippers.
>
> * * * * *
>
> "[T]he requirement is satisfied if the written instruments supply 'sufficient information upon which a prompt and complete investigation may be based.'" 447 F. Supp. at 1204 (citations omitted).

Accord, *Thompson* v. *James G. McCarrick Co., Inc.*, 205 F. 2d 897 (5th Cir. 1953); *Loveless* v. *Universal Carloading & Distributing Company, Inc.*, 225 F. 2d 637 (10th Cir. 1955); *Rollei of America, Inc.* v. *T.I.M.E.—D. C., Inc.*, 357 A. 2d 33 (N. J. 1976).[3] It has also been noted that where an employee of the carrier actually investigates the loss, it is much easier to infer that an informal writing was sufficient notice. *Atchison, Topeka and Santa Fe Railway Co.* v. *Littleton Leasing and Investment Company, Inc.*, 582 F. 2d 1237, 1241 (10th Cir. 1978).

Similarly, in *Gay* v. *Graves Trucking Line, Inc.*, 573 P. 2d 632, 634 (Kan. Ct. App. 1977), the court noted that federal decisions have been liberal in construing the sufficiency and timeliness of shippers' written claims and that no particular

3. Cases cited by the defendant which have held that lack of notice absolved the carrier generally involved situations in which apparently no written notice or actual notice of a claim was received within the required time. *Atchison, Topeka and Santa Fe Railway Co.* v. *Littleton Leasing and Investment Company, Inc.*, 582 F. 2d 1237 (10th Cir. 1978); *Henry Pratt Company* v. *Stor Dor Freight Systems, Inc.*, 416 F. Supp. 714 (N. D. Ill. 1975); *Delphi Frosted Foods Corp.* v. *Illinois Central Railroad Co.*, 188 F. 2d 343 (6th Cir. 1951). Another case refused to allow the shipper's claim even though the carrier had actual notice, because no written claim in any form was filed within the requisite time. Since there was at least informal written notice here, even that case is distinguishable. *Johnson & Dealaman, Inc.* v. *William F. Hegarty, Inc.*, 224 A. 2d 510 (N. J. Super. 1966).

form of written claim is necessary, nor need the claim set out all the particulars of the damage. Consequently, the court held that the requirements of the uniform bill of lading and the Interstate Commerce Commission regulations (discussed *infra*) were satisfied by an inspector's report and a claim for freight damage form that did not state any amount of claim despite the requirement of the regulation that the written notice specify the amount of money claimed. (49 C. F. R. § 1005.2(b)).

In the present case, the carrier knew of the loss and actually had the goods inspected. It was orally informed of the shipper's intention to file a claim and was again informed of the claim by letter, all within a few days of the loss. The letter was intended to memorialize the position of the shipper that the carrier would be held responsible for the loss. It had asserted this position orally at the time the carrier's representatives inspected the rejected shipment. The majority concludes that because this letter did not comply with the form of notice required by certain Interstate Commerce Commission regulations, the claim must fail. However, those regulations do not require the result reached by the majority, which is in conflict with the previously cited cases holding that notice is adequate if as a practical matter it allows the carrier to identify and inspect the disputed shipment.

The regulations were promulgated in 1972 in an attempt by the Interstate Commerce Commission to prevent carriers from discriminating among customers by settling spurious or frivolous claims in their favor. See *Ex Parte No. 263,* 340 I. C. C. 515, 524, 529, 530, 544, 547-548, 553, 605-606. The regulations are appended to *Ex Parte No. 263* and provide in pertinent part that

> "*A claim* for * * * damage to * * * cargo *shall not be voluntarily paid* by a carrier unless filed in writing * * * with the receiving or delivering carrier * * * within the specified time limits * * * required by law, [or by] the terms of the bill of lading * * *." (Emphasis supplied.)

49 C. F. R. § 1005.2(a), reproduced in 340 I. C. C. at 718.

The present bill of lading specified that the shipper's written claim must be filed within nine months of the alleged damage, the shortest period permitted by the Carmack Amendment. The regulations further govern the form of the notice, requiring it to identify the shipment specifically, to state specifically that the carrier would be held liable for damages and to claim a specific amount of damages (49 C. F. R. § 1005.2(b)).

The majority opinion has construed these regulations as if they imposed substantive limits on damage claims and therefore foreclosed this shipper's claim even though the record shows that the carrier had actual knowledge of all the necessary facts within nine months of the damage. However, as the Commission's report accompanying the regulations makes clear, they do not control the form that notice must take to be effective in a contested case such as this. The Commission's intent was to make claims settlement more expeditious by providing procedures for the voluntary disposition of claims by carriers. Simultaneously, the regulations were intended to guard against the potential for abuse in the claims settlement process by providing that no voluntary settlements could be made unless the rather rigid written notice requirements were met. As the Commission's report clearly contemplated, the penalty for failure to comply with the notice required by the regulations is that the claimant must take the time-consuming and expensive route of litigating his claim in the district court rather than utilizing the settlement procedures authorized by the regulations. See 340 I. C. C. at 614. The Commission did not intend to erect a substantive barrier to claims recovery and acknowledged that in any event it did not have authority to do so. 340 I. C. C. at 542. Therefore, as in *Hopper Paper Co.* v. *Baltimore & Ohio R. Co., supra,* certiorari denied, 339 U. S. 943, in a contested case failure to give formal written notice of a claim for damages

within the nine months provided in the bill of lading does not control the outcome in the district court. Such lack of formal written notice "is excused, or is inapplicable where [as here] the carrier has or is chargeable with actual knowledge of all the conditions as to the damages that a [formal] written notice would give." 178 F. 2d at 181-182. This Court noted that the purpose of requiring the filing of a claim "is not to escape liability, but to facilitate prompt investigation * * * [and] is addressed to a practical exigency and * * * to be construed in a practical way."[4] Accordingly, in *Hopper Paper Co.*, we held as follows (at page 182):

> "In the instant case it is undisputed that defendant and its agents were fully aware and cognizant of the existence of all the facts concerning the wreck and destruction of the carload of paper. In such a situation a formal notice by plaintiff to the defendant could not have accomplished anything more. Hence, we conclude that the carrier may not use the provisions of the bill of lading [requiring written notice to the carrier within nine months after delivery of the damaged property] to shield itself from the liability imposed upon it by the statute and the common law for its negligent destruction of the shipper's property. To hold otherwise would not be construing the bill of lading 'in a practical way.' "

As the *Hopper* Court observed, permitting the carrier's knowledge to substitute for a written notice is not discriminatory nor a preference and therefore the carrier was not permitted to escape liability on the technicality imposed by the present majority opinion.[5]

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4. The quotation was taken from *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 196, 198.

5. *Hopper* was consistent with and cited *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396 (2d Cir. 1927), certiorari denied, 271 U. S. 571; and was discussed with approval in *Loveless* v. *Universal Carloading & Distributing Co., Inc.*, 225 F. 2d 637 (10th Cir. 1955); and was followed in *Delaware, L & W R. Co.* v. *United States*, 123 F. Supp. 579 (S. D. N. Y. 1954); *Stearns-Rogers Cor-*

(Footnote continued on next page.)

In my judgment, the shipper's letter of August 2, 1974, to the carrier, together with written documents in the carrier's file identifying the shipment, quantity of goods shipped, the extent and cause of damage, plus the surrounding circumstances disclosed in the record, gave the carrier "actual knowledge of all the conditions as to the damages that written notice would give." *Hopper Paper Co., supra,* 178 F. 2d at 181.[6] Thus the carrier's delivery receipt (Memo 59515) shows that the goods were received from the shipper on July 29, 1974, and were to be maintained by carrier at zero temperature en route to the Naval Supply Center in Norfolk, Virginia, where they were to be delivered on July 31, 1974. The shipper's delivery receipt (Memo 59557) shows that the Naval Supply Center refused delivery because the temperature was too high (1.2 degrees over tolerances), so that all the meat was to be returned to the shipper. The record also shows that the meat was exclusively in the carrier's possession from its shipment from Butler, Wisconsin, to Norfolk, Virginia, and back. One of the carrier's representatives was present when the seal was broken and the trailer was opened in Norfolk, Virginia, on July 31, 1974, and when the tests were made which determined that the meat was not within acceptable military standards so that it was rejected. Thereupon, the carrier gave the shipper its first notification of the loss and had the refrigeration unit on the trailer checked in Pittsburgh, Pennsylvania, on the return trip from Norfolk, Virginia. A

(Footnote continued from preceding page.)

poration v. *Norfolk and Western Railway Co.,* 356 F. Supp. 1238 (N. D. Ill. 1973); *MGD Graphics Systems Americas Co.* v. *Acme Fast Freight, Inc.,* 437 F. Supp. 10 (N. D. Ill. 1977). Summary judgment was later entered for the carrier in *MGD Graphics* only because its subsequent affidavit showed the carrier had no knowledge of the extent of the shipper's loss. Here Indiana Refrigerator had tried unsuccessfully to sell the damaged meat and therefore knew how drastically it was damaged and the outer limits of its liability.

6. Cases not applying *Hopper* to their facts have not questioned its applicability to circumstances like these. See *East Texas Motor Freight Lines* v. *United States,* 239 F. 2d 417, 420 n. 10 (5th Cir. 1957).

carrier representative was also present at the shipper's premises when the meat was returned there on August 2, 1974, and remained there while military personnel tested the meat and found that it was still 1.2 degrees over the required tolerances. The carrier's tender of the returned meat was then refused by the shipper. At the same time, the carrier representative checked the refrigeration on the trailer, was told that the shipper would look to the carrier for reimbursement, and afterwards tested the refrigeration unit for an additional period of three days on the carrier's premises. On August 5, 1974 the carrier's Milwaukee terminal manager advised the shipper he had been unable to dispose of the meat and had the shipper take back the meat to dispose of on the carrier's behalf.[7] Thus within a few days of the damage the carrier had all the necessary information it needed to defend against the shipper's claim, including an informal writing from the shipper, and was certainly enabled "to facilitate prompt investigation" (*Blish Milling Co., supra,* 241 U. S. at 196).

The bill of lading merely required written claims of damage without any further specificity (Supp. App. 112). Since the carrier had knowledge of the fact of the damage, the extent of the damage and the reasons for the rejection by the consignee, a more complete written notice than was contained in the August 2, 1974, letter to the shipper was unnecessary.[8] The informal written notice contained in the Shipper's August 2 letter fulfilled the bare requirement of the bill of lading that written notice be sent within nine months of the loss. The carrier had both informal written notice and actual notice which was similar to the actual notice held adequate in *Hopper.* Since the regulations

7. The facts described throughout this dissent are plaintiff's version of events. For the purposes of determining the propriety of summary judgment for the defendant, we must of course assume that plaintiff could prove its assertions.

8. 49 C. F. R. § 1005.2(c), *supra,* on which the majority relies, is inapplicable because that entire regulation is geared to claims being voluntarily paid by a carrier. See 49 C. F. R. § 1005.2(a), *supra.*

requiring a specific form of notice are applicable only to voluntary settlements, they do not change the precedential value of *Hopper* and the previously cited cases authorizing informal notice. In these circumstances, summary judgment for the carrier gave it an improper windfall. Accordingly, the cause should be remanded for a new trial.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

WISCONSIN PACKING CO., INC.,
a Wisconsin Corporation,
Plaintiff,
vs.
INDIANA REFRIGERATOR LINES, INC.,
Defendant.

Civil Action
No. 76-C-611

DECISION AND ORDER.

This is an action brought pursuant to § 20(11) of the Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. § 20(11), for damages in the amount of $13,192.66 arising out of the nonacceptance by the consignee United States Navy of 32,340 pounds of frozen meat tendered by the plaintiff-consignor Wisconsin Packing Company, Inc., to the defendant-carrier Indiana Refrigerator Lines, Inc., for delivery to the Naval Supply Center in Norfolk, Virginia. There is no dispute that the shipment was rejected by the consignee on arrival in Virginia on July 31, 1974, for the reason that the meat was found to be 1.2 degrees Fahrenheit over the acceptable tolerances set forth in the handbook of military regulations. The shipment was returned to Milwaukee and eventually disposed of by the plaintiff.

The defendant has moved for summary judgment, claiming that the plaintiff failed to provide to defendant appropriate written notice of its claim within the time set forth in 49 U. S. C. § 20(11) and the regulations thereunder, and is therefore not entitled to any relief. For the reasons hereinafter stated, defendant's motion will be granted.

Section 20(11) of Title 49, U. S. C., provides in part that any common carrier receiving property for transportation in interstate commerce shall issue a bill of lading therefor and shall

be liable to the lawful holder of the bill for any loss, damage, or injury to the property caused by the carrier. Section 2(b) of the uniform bill of lading, authorized by 49 U. S. C. § 20(11), requires that a written claim be filed with the carrier no later than nine months after the complained of damage occurred. The regulations promulgated by the Interstate Commerce Commission, 49 C. F. R. § 1005, 37 Fed. Reg. 4258 (1972), provide in part that any such claim shall be in writing, shall contain facts sufficient to identify the shipment involved, shall assert liability for alleged loss or damage, and shall make claim for the payment of a specified or determinable amount of money. See 49 C. F. R. § 1005.2(b).

The parties have submitted a statement of agreed facts to the court in which they state that the only written document relative to the shipment in question which was submitted by the plaintiff to the defendant within the required nine-month period was a letter dated August 2, 1974, addressed to Mr. James Stevenson and signed by Mr. Karl Brown. Mr. Stevenson is the defendant's Milwaukee Terminal Manager and Mr. Brown is an officer of the plaintiff. The letter provides:

> "Wisconsin Packing Company refuses to accept meat on trailer no. 4013 because of Army rejection of temperatures averaging 1.2 degrees over acceptable allowance temperatures. Return temperatures checked out and ranged from nine to twenty-five degrees." (Exhibit II of defendant's exhibits on motion for summary judgment, filed March 25, 1977.)

There is a disagreement as to whether Mr. Brown also informed Mr. Stevenson orally in early August 1974 that the plaintiff would be looking to defendant for reparation of its damages. There is also a dispute as to whether plaintiff took back possession of the meat voluntarily on August 5, 1974, or whether it did so only after being informed by Mr. Stevenson that he was unable to dispose of the meat. No further written documents were given to defendant by plaintiff until May 30,

1975, at which time plaintiff filed a "supplemental claim," a copy of which has not been provided to the court.

The defendant argues that the August 2, 1974, letter does not constitute a written notice of claim for loss or damage because it does not identify the shipment with specificity, does not state that the defendant is liable for damages to the plaintiff, and does not set forth a specific or determinable amount claimed. The plaintiff asserts that the letter satisfies the requirements of 49 C. F. R. § 1005, but that in any event, under the relevant case law, it is sufficient if the carrier has actual notice of the claim within the nine-month period.

Pursuant to the I. C. C. regulations, the letter of August 2, 1974, cannot be considered a claim. Section 1005.2(c), 49 C. F. R., provides in part:

> "(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, * * * shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section."

Under the relevant case law as well, notice of damage is not considered equivalent to notice of a claim. See, e.g., *Johnson & Dealaman, Inc.* v. *Wm. F. Hegarty, Inc.*, 93 N. J. Super. 15, 224 A. 2d 510 (1960), and cases cited therein; *Henry Pratt Company* v. *Stor Dor Freight Systems, Inc.*, 416 F. Supp. 714 (D. C. Ill. 1975). The plaintiff's reliance on certain cases, cited in its brief, is misplaced. Thus, in *Georgia, Florida & Alabama Railway Company* v. *Blish Milling Company*, 241 U. S. 190, 193 (1916), the document involved provided in part: " 'We will make claim against railroad for entire contents of car at invoice price.' " In *Thompson* v. *James G. McCarrick Co.*, 205 F. 2d 897 (5th Cir. 1953), the shipper's "statement of protest" specificaly provided: " ' * * * [we] are hereby also entering claim for $100.00, subject to correction * * *." In *Rollei of*

America, Inc. v. *T. I. M. E.—DC, Inc.*, 357 A. 2d 33, 35 (N. J. 1976), the Court stated that "[t]he significant factor that must be found is a statement of intent to press a claim within the applicable time period as well as notice of loss." It held that a letter from the plaintiff to the carrier stating that plaintiff expected the carrier to substantiate delivery of plaintiff's goods to a third party or a claim for damages would be filed, when coupled with defendant's failure thereafter to substantiate delivery, was sufficient notice of a claim.

Delaware, L. & W. R. Co. v. *United States*, 123 F. Supp. 579 (S. D. N. Y. 1954), and *Stearns-Rogers Corporation* v. *Norfolk & Western Railway Co.*, 356 F. Supp. 1238 (N. D. Ill. 1973), are of somewhat more assistance to plaintiff, as in those cases it does not appear that any document purporting to be a claim per se was ever provided to the carrier; however, it does appear that in each case a statement of specific damage was provided to the carrier under circumstances which the court found gave rise to no other inference but that the plaintiff intended to press a claim. Even assuming that those cases were correctly decided, in this case the writings which the defendant had in its possession, i.e., the August 2, 1974, letter and invoices indicating that the shipment was rejected by the consignee, told the defendant no more than that the shipment had been rejected and that the plaintiff refused tender of it on its return to Milwaukee. Section 1005.6, 29 C. F. R., provides that if property is refused upon tender to the owner, the carrier shall dispose of the property and shall make an itemized record of the disposal "sufficient to identify the property involved so as to be able to correlate it to the shipment * * * *and claim, if any,* filed thereon." (Emphasis added.) Under the regulations, therefore, a refusal of tender without more also does not constitute a claim or notice that a claim will be filed.

The plaintiff also seeks to rely on *Hopper Paper Co.* v. *Baltimore & O. R. Co.*, 178 F. 2d 179 (7th Cir. 1949), in which the United States Court of Appeals for the Seventh Circuit held that

despite the requirement of a written claim set forth in § 2(b) of the uniform bill of lading and in 49 U. S. C. § 20(11):

> "* * * failure to give notice of a claim for damages or loss in accordance with a stipulation in a contract for the shipment of goods is excused, or is inapplicable, where the carrier has or is chargeable with actual knowledge of all the conditions as to the damages that a written notice could give. * * *" 178 F. 2d at 181.

See also *Stearns-Roger Corporation* v. *Norfolk & Western Railway Co.*, 356 F. Supp. 1238 (N. D. Ill. 1973).

Initially, the Court notes that *Hopper* was decided prior to enactment of the currently applicable I. C. C. regulations. See 37 Fed. Reg. 4258 (1972). The Court has already found that the August 2, 1974, letter in this case does not comply with 29 C. F. R. § 1005.2(b). Rules and regulations promulgated by administrative agencies pursuant to statutory authority have the force and effect of law. *Atwood's Transport Lines, Inc.* v. *United States*, 211 F. Supp. 168, 170 (D. D. C. 1962); *Giancana* v. *Johnson*, 335 F. 2d 372 (7th Cir. 1964). Thus it would appear that *Hopper* is no longer controlling. *But cf., Stearns-Roger Corporation* v. *Norfolk & Western Railway Co., supra; Henry Pratt Company* v. *Stor Dor Freight Systems, Inc.*, 416 F. Supp. 714 (N. D. Ill. 1975). Assuming that *Hopper* is controlling, this case is not within the holding in *Hopper*. There is no dispute as to the written documents which were within the defendant's possession during the relevant nine-month period. The Court will also assume that one of plaintiff's agents told the defendant in early August 1974 that plaintiff would be looking to defendant for reimbursement of its losses. (See Brown's affidavit.) Thereafter, according to the affidavit of Mr. James Stevenson, filed on behalf of the defendant, no claims for damages were made and defendant received no communications from plaintiff with regard to the shipment in question until May 30, 1975, more than nine months after the alleged date of injury. Plaintiff's affidavits raise no issue of fact with regard to the period of

August 5, 1974 through May 30, 1975. As a matter of law, therefore, the Court concludes that until May 30, 1975, when the supposed "supplemental claim" was filed, the defendant was not in fact "chargeable with actual knowledge of all the conditions as to the damages that a written notice would give." *Hopper Paper Co.* v. *Baltimore & O. R. Co., supra,* at 181. Absent some further confirmation in writing from the plaintiff that it intended to file a claim or, at a minimum, an itemization of loss from plaintiff, the defendant was not chargeable with knowing that the plaintiff had in fact suffered any loss for which it sought reimbursement.

Pursuant to 49 U. S. C. § 20(11), a carrier may not voluntarily pay a claim unless it is set forth in writing, nor may it waive the writing requirement, the function of which is to prevent the possibility of preferences and other discriminatory acts by and between shippers and carriers. *Georgia, Florida & Alabama Railway Company* v. *Blish Milling Company,* 241 U. S. 190 (1916); *Chesapeake & Ohio Railway Company* v. *Martin,* 283 U. S. 209 (1931). Furthermore, as stated in *Henry Pratt Company* v. *Stor Dor Freight Systems, Inc.,* 416 F. Supp. 714, 715 (N. D. Ill. 1975), a bill of lading is a contract between the parties, and:

> "* * * in order for a carrier and its accountants to know what contingent or other liabilities exist at any given time, it should be able to rely upon applicable statutes of limitations. As a matter of common equity between contracting parties, the widely criticized *Hopper* decision should not be extended."

For the foregoing reasons,

IT IS ORDERED that the motion of the defendant Indiana Refrigerator Lines, Inc., for summary judgment is granted and this action is dismissed.

Dated at Milwaukee, Wisconsin, this 5th day of September, 1978.

/s/ JOHN W. REYNOLDS
John W. Reynolds, *Chief Judge*

STIPULATION OF FACTS

By Agreement of Counsel, the following stipulation of facts is offered to expedite the Court's decision.

(1) The shipment involved in the instant proceeding was governed by the terms and conditions of the Uniform Domestic Straight Bill of Lading, a copy of which is attached hereto as Exhibit I for ease of reference.

(2) That the only written document relative to the shipment in question submitted by Plaintiff, Wisconsin Packing to Defendant, Indiana Refrigerator Lines within nine months of the shipment in question was a letter dated August 2, 1974 addressed to Mr. James Stevenson and signed by Mr. Karl Brown. A copy of this document is attached hereto as Exhibit II and incorporated by reference.

(3) That relative to the shipment in question, Defendant had in its possession I. R. L. invoice No. 01647; I. R. L. memo No. 59557; I. R. L. delivery receipt No. 59515. Copies of these documents are also attached hereto as Exhibit III and incorporated by reference.

/s/ John P. Brady
John P. Brady

/s/ H. Barney Firestone
H. Barney Firestone

49 U. S. C. § 11707 et seq.

§ 11707. Liability of common carriers under receipts and bills of lading.

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier, over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul tranportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor

common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passengers trains, boats, or motor vehicles, or trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court,

is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

49 C. F. R. § 1005.2 et seq.

§ 1005.2 Filing of claims.

(a) *Claims in writing required.* A claim or loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed in writing, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and (1) containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

(c) *Documents not constituting claims.* Bad orders reports, appraisal reports of damage, notations of shortage or damage,

or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) *Other claims.* If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or overlapping claims and shall require further substantiation, on the part of each claimant of his title to the property involved or his right with respect to such claim.

Section 2(b) Uniform Bill of Lading

Section 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing the bill of lading or carrier on whose line the loss, damage, injury or delay occured, or carrier in possession of the property when the loss, damage, injury or delay occurred,

within nine months after delivery of the property (or, in the case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions no carrier hereunder shall be liable, and such claims will not be paid.

Supreme Court, U. S.
FILED
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No. 79-1958

In the
Supreme Court of the United States
OCTOBER TERM, 1980

INDIANA REFRIGERATOR LINES. INC.,
Petitioner,
vs.
WISCONSIN PACKING CO., INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Supplemental Brief of Petitioner

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Supplemental Brief of Petitioner

Pursuant to Rule 22(6) of the Rules of the United States Supreme Court, Petitioner, Indiana Refrigerator Lines, Inc. submits this, its Supplemental Petition, for a Writ of Certiorari in this case. This Supplemental Petition is necessitated by the fact that a very recent decision of the United States Court of Appeals for the Second Circuit has just come to the attention of Indiana Refrigerator Lines, Inc.

In *Pathway Bellows, Inc.,* v. *Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the*

Penn Central Transportation Co., 625 F. 2d ..... (2nd Cir. 1980), Docket No. 79-7860, decided September 2, 1980, the Second Circuit Court of Appeals specifically held in favor of the defendant carrier under circumstances similar to that existing in the instant case. The Second Circuit Court of Appeals specifically referred to the Seventh Circuit Court of Appeals' decision in *Wisconsin Packing Co., Inc.*, v. *Indiana Refrigerator Lines, Inc.*, 618 F. 2nd 441 (7th Cir. 1980) (en banc) and specifically disagreed with many of the holdings contained therein. This Supplemental Petition is to notify the Court of the decision in that case, a copy of which is appended for the Court's consideration, and to further urge a grant of Petitioner's Petition for a Writ of Certiorari in order to resolve clear conflicts in the Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 882—September Term, 1979

(Argued March 19, 1980 Decided September 2, 1980)

Docket No. 79-7860

Pathway Bellows, Inc.,

Plaintiff-Appellee,

vs.

Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Penn Central Transportation Co.,

Defendant-Appellants.

Before:

Waterman, Mansfield and Timbers, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *District Judge,* entered upon cross-motions for summary judgment, granting the motion of plaintiff-appellee on its freight damage claim and denying that of the defendant-appellants.

Reversed and remanded for entry of judgment in favor of defendant-appellants.

Kenneth R. Feit, David H. Deitsch, Gates, Singer & Deitsch, Rockville Centre, N.Y., *for Appellee.*

Hyman Hillenbrand, Bleakley, Platt, Schmidt & Fritz, New York City, *for Appellants.*

Waterman, *Circuit Judge*:

Defendant-appellants, Trustees of the Penn Central Transportation Co. (Penn Central), appeal from a judgment entered in the United States District Court for the Southern District of New York (Sand, District Judge), which granted the motion of plaintiff-appellee Pathway Bellows for summary judgment. For the reasons stated below, we reverse the judgment of the district court.

The parties agreed upon all the relevant facts, and the case was submitted to the court below on cross-motions for summary judgment. We briefly summarize those facts before our review of the reasoning and decision of the district court.

On September 24, 1974, Pathway Bellows contracted with the receiving carrier, the San Diego & Arizona Eastern Railway Co. (SD & A) to transport a shipment of metal expansion joints from El Cajon, California to the Gouverneur Iron Works in Oswego, New York. The shipment arrived at its destination on October 22, 1974, where it was delivered by Penn Central, the delivering carrier, in a damaged condition. Pursuant to a telephone request, a Penn Central agent examined the shipment and prepared a Freight Inspection Report dated October 22, 1974, which noted damage, damage which the parties later stipulated totaled $40,000.

One of the provisions of the bill of lading issued by SD & A for this shipment required Pathway Bellows to submit any damage claims in writing, and to file them with an appropriate carrier within 9 months of the date of delivery of the damaged property.[1] The parties have

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[1] At the time this lawsuit arose, section 20(11) of the Interstate Commerce Act, 49 U.S.C. § 20(11), commonly known as the Carmack Amendment, provided in relevant part that "it shall be unlawful for any . . . carrier to provide . . . a shorter period for the filing of claims than nine months. . . ." On October 17, 1978, the Interstate Commerce Act was revised, codified, and enacted, without substantive change, as subtitle IV of Title 49 of the United

agreed that this 9 month period began on October 22, 1974, and expired on July 22, 1975.

On May 12, 1975, Pathway Bellows sent to Penn Central the following letter:

> Although we have contacted your company earlier, the purpose of this letter is to state, in writing, that we are in the process of filing a claim for freight damage of a shipment to Gouverneur Iron Works, Oswego, New York.

This letter also made reference by caption to the Freight Inspection Report, the Way Bill covering the shipment and the railroad car in which the shipment was transported.

On July 22, 1975, Pathway Bellows sent to SD & A a more detailed letter, which SD & A received the following day. This letter asserted the claim of Pathway Bellows for damages to the shipment of expansion joints, and advanced a specific dollar amount for the alleged liability.[2]

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[1] (Continued)

States Code. The relevant portion of the Carmack Amendment currently appears, with minor changes in phraseology, as 49 U.S.C. § 11707(e) (Supp. II 1978). Carriers have implemented this statutory directive by including in the Uniform Bill of Lading the following provision, which has been approved and prescribed by the Interstate Commerce Commission:

> 2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier . . . within nine months after delivery of the property. . . . Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

[2] Pathway Bellows subsequently sent letters to both Penn Central SD & A, which amended the amount of damages claimed.

In the district court the sole question for resolution was whether Pathway Bellows had complied with the contractually imposed condition precedent to maintain an action to recover its damages, *i.e.*, whether Pathway Bellows had timely filed with an appropriate carrier a proper written claim. With reference to Pathway Bellows's letter of May 12, 1975, the court below held that, although timely filed, the letter was formally deficient in several important respects, and therefore could not qualify as a proper written claim. We shall defer further discussion of this ruling until we have addressed the district court's treatment of the July 22, 1975 letter.

Penn Central conceded that Pathway Bellows's July 22, 1975 letter contained all elements necessary to classify it as a proper written claim, but maintained that the letter was not timely filed, because although mailed by Pathway Bellows on the final day of the 9 month claim period, it was not received by SD & A until the day after the claim period had expired. Because "filed" was not defined in the bill of lading or in the applicable statute and regulations, the court below regarded the term as somewhat ambiguous. Although recognizing that the word "filed" had a well-established technical meaning in other areas of the law, and that such meaning implicitly equated a filing with the date of receipt of the item to be filed, the court concluded that such a technical construction was inappropriate to a situation involving only private parties. The court noted that, as between private parties, papers are "served" rather than "filed," and the date of service is equated with the date of mailing. Applying this construction of the term "filed" to the facts of this particular case,[3] the court below held

[3] Although the court below stated that "Were we required to resolve the question . . . whether in all cases a claim is 'filed' upon mailing or upon receipt by the carrier, we would be inclined to conclude that a claim is filed when it is mailed by the claimant," it made every effort to appear not to rely explicitly on this approach but at-

that, because Pathway Bellows had mailed a proper written claim on the final day of the 9 month claim period, the claim had been timley filed and the terms of the bill of lading had been timely complied with. Accordingly, the district court denied Penn Central's motion for summary judgment and granted Pathway Bellows's motion, from which grant the defendant-Trustees appeal.

As an initial matter, we agree with the defendant-Trustees that the district court's construction of the word "filed" finds neither support nor precedent in case law. Indeed, relevant authority is uniformly to the effect that a paper will not be considered "filed" until it has been delivered to and received by the party with whom it is to be filed. *See United States* v. *Lombardo,* 241 U.S. 73 (1916); *Laser Grain Co.* v. *United States,* 250 F. 826 (8th Cir. 1918); *In re Imperial Sheet Metal, Inc.,* 352 F.Supp. 1149 (M.D.La. 1973); *President & Dirs of Manhattan Co.* v. *Laimbeer,* 108 N.Y. 578, 15 N.E. 712, 71 N.Y.S. App. 656 (1888); *Schaffer* v. *Pennsylvania R.R.,* 127 N.Y.S. 2d 466 (Mun. Ct. 1950), *aff'd,* 127 N.Y.S.2d 468 (App. Term 1952).

We do not believe the present case is sufficiently distinguishable from prior case law to warrant a different construction of the word "filed," and we find that the court below erred in holding that the claim of Pathway Bellows was filed when the letter of July 22, 1975 was deposited in the mail. Instead, we hold that, because

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[3] (Continued)

tempted to limit its holding to the factual situation presented in this case. Accordingly, the court framed its holding as follows:

> [A]t least where the shipper has furnished written notice within the period required by the bill of lading that it is in the process of filing a claim for damages, and identifies that claim with some specificity, such a claim when subsequently made and received by the carrier will be deemed to have been filed when it is deposited in the mail, not when it is received by the carrier.

SD & A did not receive this letter until the day after the 9 month claim period had expired, the claim was not timely filed as required by the terms of the bill of lading.

We now return to the district court's treatment of the May 12, 1975 letter. In addressing this issue, the court below first determined that the requisite characteristics of a proper written claim had been codified in certain regulations issued by the Interstate Commerce Commission.[4] The district court then examined the May 12, 1975 letter and found that it lacked two of the three minimum claim filing requirements established by the regulations, for it failed to assert that Penn Central was liable for any loss, and it failed to claim a specified

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[4] These regulations appear at Part 1005 of Title 49 of the Code of Federal Regulations. The court below found the following sections to be controlling:

§ 1005.2 Filing of claims.

. . . .

(b) *Minimum filing requirements.* A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

or ascertainable amount of money as damages. Thus the court ruled that the Pathway Bellows letter of May 12, 1975 was not a proper written claim within the meaning of the regulations.

Although we do not agree with Pathway Bellows's argument that the facts do not support the district court's findings relaive to the May 12, 1975 letter and that its ruling thereto should be reversed as clearly erroneous, a case recently decided by the U. S. Court of Appeals for the Seventh Circuit appears to suggest that the regulations relied on in the court below do not provide the proper standard for assessing the sufficiency of contested claims.

In that case, *Wisconsin Packing Co.* v. *Indiana Refrigerator Lines,* 618 F.2d 441 (7th Cir. 1980) (en banc), *petition for cert. filed,* 48 U.S.L.W. 3838 (June 12, 1980), the court declared that the subject regulations were intended to apply to voluntary dispositions of claims by carriers so as to insure that the process of claims settlement by carriers would be more expeditious and less subject to discriminatory manipulation, *Id.* at 445. Where, however, the mechanisms of voluntary claims settlement were not employed, *i.e.,* where a carrier disputed its liability and a judicial determination of the validity of the disputed claim was sought, the *Wisconsin Packing* court concluded that the subject regulations did not dictate the form a claim must take. Rather, the sufficiency of a claim in such a situation was to be assessed under the case law in existence prior to the regulations issued by the I.C.C.[5]

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[5] The governing standard initially was set forth by the Supreme Court in *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.,* 241 U.S. 190 (1916), where the Court made clear that satisfaction of the shipper's obligation to submit to the carrier a written claim "does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way." *Id.* at 198. Through the years, courts occasionally have attempted to refine the very general *Blish Milling* standard. *See, e.g.,*

[5] (Continued)

Insurance Co. of North America v. *Newtowne Mfg. Co.*, 187 F.2d 675 (1st Cir. 1961) (written claim requirement will be satisfied by submission of "a written document, however informal in expression, indicating an intention on the shipper's part to claim reimbursement from the carrier for a loss asserted to have occurred in the past, and sufficiently identifying the shipment in question . . ." *Id.* at 681).

However, because the case law has not brought the contours of a properly constituted claim into very sharp focus, and because of the well-recognized policy underlying the written claim requirement, *i.e.*, not to permit the carrier to escape liability, but to insure that the carrier may make a prompt and thorough investigation of the claim, *see Blish Milling, supra,* 241 U.S. at 198, courts applying the case law standard have been extremely reluctant to conclude that the written claim requirement has not been satisfied in any situation where a carrier has seen a written document noting damage to a particular shipment and implying the carrier's responsibility therefor. *See Wisconsin Packing Co., supra,* 618 F.2d at 446 and cases there cited.

We do not believe that the ICC, in promulgating the claim-filing regulations, intended a radical departure from the claim investigation policy underlying the written claim requirement. To the contrary, the applicable section of the regulations and the relevant source material indicate a clear intention to encourage the investigation of claims by carriers. *See* 49 C.F.R. § 1005.4; *Ex Parte No. 263, supra,* 340 I.C.C. at 559-68.

Neither do we believe that the ICC, by specifying minimum claim-filing requirements, intended to afford carriers an unfair opportunity to escape liability. The minimum filing requirements appear to call for no more information than one ordinarily would expect a claim for damages to contain, and compliance with these requirements is neither onerous nor unreasonable. To the extent that carriers may escape liability, such "windfalls" may be properly traced, not to the existence of the regulations, but to shippers' unexcused failures to comply with a reasonable condition contained in bills of lading.

From our examination of the regulations and the relevant source material,[6] we do not believe that the dual standards for assessing the sufficiency of claims, depending upon whether the carrier voluntarily decides to settle a claim or to contest its liability, were either intended or mandated.[7] Although we agree with the *Wisconsin Packing*

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[5] (Continued)

However, we do agree with the implicit conclusion of the *Wisconsin Packing* court that the very fact that the regulations identify a properly constituted claim as one that contains certain minimum filing requirements distinguishes the standard established by the I.C.C. regulations from the standards established by the case law.

[6] The regulations were formulated in a rather extensive rulemaking proceeding conducted by the ICC. *Ex Parte No. 263: Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims,* 340 I.C.C. 515 (1972). In addition, certain prefatory material accompanied the publication of the regulations in the Federal Register. 37 Fed. Reg. 4257 (March 1, 1972).

[7] Certainly, there is no explicit expression in the regulations themselves that their applicability is intended to be limited solely to those claims that carriers decide to settle voluntarily. To the contrary, 49 C.F.R. § 1005.1, the section dealing specifically with the applicability of the regulations, provides as follows:

> The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each [carrier] . . . subject to the Interstate Commerce Act . . . .

Moreover, the ICC quite clearly stated that

> We are persuaded by the record in this proceeding that our regulations should embrace the full range of matters relating to the filing of claims, including a prescription of minimum filing requirements and a consideration of documents that do not constitute claims, and claims for uncertain amounts.
>
> . . . .

court that the ICC's principal aim in promulgating these regulations was to encourage parties to settle claims instead of resorting to costly time-consuming litigation, and although we recognize that the ICC lacks the adjudicative authority to pass on the merits of claims,[8] we point out that there is a vast difference between prescribing the form a properly constituted claim must take and that of determining the substantive merits of that claim.

Furthermore, the regulations impose numerous obligations upon carriers, which are triggered by the receipt of

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[7] (Continued)

> . . . Thus, the rules set forth in sections 1005.1 and 1005.2 . . . first establish their overall applicability and then set out the manner and form in which loss and damage claims must be filed by claimants in order to accomplish the improvements shown to be required in the public interest in this area.

Ex Parte No. 263, supra, 340 I.C.C. at 55-56.

It appears, therefore, that the ICC intended to promulgate regulations that would apply generally to all claims and we can perceive no lack of statutory authority vested in the Commission which would frustrate it from fulfilling its intention. See discussion of statutory and case law basis for the Commission's authority to promulgate these regulations in *Ex Parte No. 263, supra,* 340 I.C.C. at 542-46.

[8] The ICC itself was well aware of the limits of its jurisdiction in this area: "This Commission has consistently held that it does not hove jurisdiction to determine the merits or the measure of damages of particular loss and damage claims, those being cognizable only in the courts." *Ex Parte No. 263, supra,* 340 I.C.C. at 539.

In an attempt to remedy this lack of jurisdiction, the ICC proposed certain legislation that would have conferred on the Commission original jurisdiction to adjudicate the merits of loss and damage claims. *See Ex Parte No. 263, supra,* 340 I.C.C. at 588-97, 721-22. Congress, however, did not follows the Commission's recommedation and declined to enact the necessary enabling legislation.

a "claim."[9] Having thus required a carrier to take certain actions once a claim is received, we think it is neither inappropriate nor beyond the authority of the ICC at the same time to provide a carrier with some guidance as to what constitutes a claim, so that a carrier may know one when it sees one. Therefore, we agree with the court below that the regulations provide the appropriate standard for assessing the sufficiency of all claims irrespective of the way they may subsequently be resolved or adjudicated.

In summary, we agree with the ruling of the district court that the Pathway Bellows letter of May 12, 1975 was inadequate in form to constitute a written claim. However, we conclude that the district court erred in finding that the Pathway Bellows letter of July 22, 1975 was timely filed when mailed, for we hold that, because this letter was received after the 9 month claim period had expired, it cannot qualify as a timely filed claim. We, therefore, hold that as Pathway Bellows failed to comply with the contractually imposed condition precedent to maintain an action to recover its damages the defendant-Trustees were entitled to prevail on their motion for summary judgment. Although it may appear Draconian to require that Pathway Bellows lose a $40,000 recovery because its claim letter was received one day late, Pathway Bellows has identified no special circumstances that would entitle it to be relieved of the admittedly severe consequences of its own procrastination.[10]

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[9] *See, e.g.*, § 1005.3(b) (carrier must create individual file and assign file number to claim upon receipt of same); § 1005.3(a) (carrier shall acknowledge receipt of claim within 30 days of receiving same); § 1005.5 (carrier shall pay, decline, or make firm settlement offer in writing to claimant within 120 days after receipt of claim).

[10] Had any conduct on the part of Penn Central misled Pathway Bellows into believing that there was no need to file a claim, or that the letter of May 12, 1975 was sufficient to constitute a claim, Penn Central might be held

The judgment of the district court is reversed, and the cause is remanded for entry of judgment in favor of the defendant-Trustees.

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[10] (Continued)

estopped from insisting on Pathway Bellows's compliance with the timely written claim requirement contained in the bill of lading. *See, e.g., Perini-North River Associates* v. *Chesapeake & O. Ry.*, 562 F.2d 269, 272-73 (3d Cir. 1977). Similarly, if Pathway Bellows could not, in the exercise of reasonable diligence, have ascertained the extent of its loss within the 9 month claim filing period, untimely filing of a completed claim might be viewed as excusable. *See Ex Parte No. 263, supra,* 340 I.C.C. at 554-55.

Nothing in the present case, however, indicates that the reason for the untimely submission of Pathway Bellows's claim was attributable to either of these factors or to any factors beyond Pathway Bellows's control.

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1979

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1958

INDIANA REFRIGERATOR LINES, INC.,

Petitioner,

vs.

WISCONSIN PACKING CO., INC.,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE

The Statement of the Case of the Petitioner is consistent with the facts as presented by it on motion for summary judgment and as accepted by the dissenting opinion below.

The Respondent contends that the more accurate statements of fact are expressed in the majority decision at App. at A-2 through A-4. Facts must be viewed in favor of the party opposing summary judgment, the Respondent herein. 6 MOORE'S FEDERAL PRACTICE ¶56.15[3] (2nd ed. 1976) and the cases cited therein.

REASONS FOR DENYING THE WRIT

This Court will review a decision of a federal court of appeals only where there exists special and important reasons therefor. Sup. Ct. R. 17.1. Such special and important reasons include conflicts between the circuits, the exercise of the Court's supervisory powers or a case of first impression. The Petitioner and the Respondent agree that the instant case is not one of first impression. The Respondent contends that this is likewise not a case involving a conflict between the circuits or a decision requiring the Court to exercise its supervisory powers. Rather, the Petitioner herein is attempting to convince this Court to review *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F. 2d 179 (7th Cir. 1949), a case which is not material to the decision of the court below.

THE DECISION BELOW IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The court of appeals found that the written notice of claim of the Respondent was sufficient to secure to the Petitioner reasonable notice so as to facilitate a prompt investigation by it. The court of appeals concluded that the Respondent's written notice sufficiently appraised the Petitioner of the character of the claim. The court of appeals did not conclude, as contended by the Petitioner, that actual knowledge standing alone would suffice under the Carmack Amendment. 49 U.S.C. § 11707(e).

The court below correctly applied the prior pronouncements of the Court in reversing the district court's granting of summary judgment for the Petitioner and

remanding the same for trial on the issues of notice and the merits of the case. The court of appeals rejected the formalistic approach to the written notice of claim requirements as adopted in *Atlantic Coast Line R. Co. v. Pioneer Products, Inc.*, 256 F.2d 431 (5th Cir. 1958), and applied the principles adopted by this Court in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190 (1916) and *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U.S. 593 (1917).

> "The Supreme Court has indicated that a bill of lading requirement that claims be made in "writing" within a specified period of time will be enforced (*St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U.S. 593, 604-605), but the Court has also expressed a willingness to construe such writings liberally. Thus, in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, the Court stated that a bill of lading requiring written claims for losses within four months after delivery of the property was intended simply 'to secure reasonable notice' and 'to facilitate prompt investigation.' Accordingly, it held that a written notice that 'sufficiently apprised the carrier of the character of the claim * * *' was adequate. The court noted that compliance with the written notice provision of a bill of lading 'does not require documents in a particular form,' and that 'it is addressed to a practical exigency and it is to be construed in a practical way.' 241 U.S. at 198. Therefore it permitted the shipper in that case to recover even though its communications with the carrier consisted of a series of telegrams about the damage of the cargo, one of which stated a mere intention to file a claim at some later date." App. at A-5.

In applying the principle that emerged from *Blish*, the court of appeals concluded that the Respondent's written notice was sufficient, when construed in a

practical way, to advise the Petitioner of the Respondent's claim and to permit it to promptly investigate the matter so as to protect its interest.

> "Accordingly, the August 2 letter was 'an adequate statement . . . deemed to satisfy this [written claim] requirement' of the bill of lading. 241 U.S. at 198." App. at A-6.

The Petitioner, in parroting the dissenting opinion, mistakenly contends that the majority reconsidered and adopted the specific holding in *Hopper*. Even a cursory review of the majority decision below indicates that this contention is without merit. The written notice provided to the Petitioner was sufficient, under the Respondent's version of the facts, to satisfy the written notice requirements of the bill of lading.

> "We are not postulating a general rule that some actual knowledge must exist for an informal notice to be effective any more than we wish to decide whether some writing is always required. We find only that the combination of actual and written notice in this case is sufficient. Accordingly we need not reconsider the specific holding of *Hopper Paper Co. v. Baltimore & O. R. Co.*, 178 F.2d 179 (7th Cir. 1949), certiorari denied, 339 U.S. 943. Since there was more than mere actual notice in this case, to overrule *Hopper* would be inappropriate, particularly insofar as that case helps illuminate the role actual notice can play in an evaluation of the overall situation." App. at A-12.

Thus to contend, as the Petitioner does, that the court of appeals contradicted the prior decisions of this Court that "actual knowledge on the part of employees of [a carrier is] . . . not an excuse for omitting the notice in writing," *Gooch v. Oregon Short Line Railroad Co.*, 258 U.S. 22, 24 (1924), is both misleading and totally without merit.

THE WRITTEN NOTICE VIEW OF THE DECISION BELOW IS NOT IN CONFLICT WITH THE OTHER CIRCUITS

The Petitioner contends, indirectly, that the decision below is in conflict with recent decisions of the Third Circuit and Tenth Circuit. This contention is likewise without merit. Neither the decision below nor the decisions in *Perini-North River Associates v. Chesapeake & Ohio Ry. Co.*, 562 F.2d 262 (3rd Cir. 1977) and *Atchinson, Topeka & Santa Fe Ry. Co. v. Littleton Leasing Co.*, 582 F.2d 1237 (10th Cir. 1978), absolved the shipper [Respondent] from the requirement that a written notice be provided the shipper [Petitioner].

Unlike *Perini*, the Respondent herein provided written notice to the Petitioner [shipper]. While the majority concluded that the Petitioner's actions were sufficient to invoke the doctrine of estoppel as was done in *Perini*, such a finding was unnecessary because of the written notice actually provided. Thus, the decision below is not in conflict with *Perini*.

Likewise, the decision below is not in conflict with *Littelton* and a prior decision of the Tenth Circuit, *Loveless v. Universal Carloading & Distributing Co.*, 255 F.2d 637 (10th Cir. 1955). Both *Littelton* and *Loveless* stand for the principle that a "claim in writing" must be construed consistent with the practical exigencies of the situation which would include the actual knowledge of the shipper. These decisions are consistent with the decision of the court below.

CONCLUSION

For the reasons above stated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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